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COPYRIGHT ARBITRATION ROYALTY PANEL

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HEARING

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In the matter of:

DISTRIBUTION OF 1993, 1994,
1995, 1996, AND 1997 CABLE
ROYALTY FUNDS

Docket No. 2000-2
CARP CD 93-97
Phase IIPS

Tuesday,
January 9, 2001

The hearing was held in Room 414 of the
Library of Congress' Madison Building,
101 Independence Avenue, S.E., Washington, D.C., at
9:30 a.m.

BEFORE:

THE HONORABLE DOROTHY K. CAMPBELL, Chairperson
THE HONORABLE JOHN W. COOLEY
THE HONORABLE MARK J. DAVIS

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ORIGINAL

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P-R-O-C-E-E-D-I-N-G-S

(9:47 a.m.)

CHAIRPERSON CAMPBELL: Good morning. You may be seated. For the record, this is January 9, continuation of our discussions on docket no. 2000-2 CARP CD 93-97 distribution of the 1997 cable royalty funds, phase II.

As a preliminary matter, we thought we would first make sure we have numbered the exhibits appropriately that were presented, not necessarily received, but presented. Mark Davis is keeping track of those. Mr. Davis, I think I'll ask you to oversee that at this moment.

ARBITRATOR DAVIS: Thank you very much. For purposes of identification, we are going to be splitting some of the exhibits up, referring to Exhibit 13, 14, 15, and 16.

Exhibit no. 13 is the November 4, 1999 cover letter from the MPAA and Ms. Kessler to Brian Lacey of Lacey Entertainment. That's Exhibit no. 13.

Exhibit no. 14 remains the same, which is an April 5 letter to Ms. Kessler from Brian Lacey that

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1 has three paragraphs in it. That's number 14.

2 Number 15 is the representation agreement
3 that Lacey signed October 22, 1999.

4 Exhibit no. 16 is another April 5, 2000
5 letter to Ms. Kessler from Mr. Lacey. This one has
6 two paragraphs in it.

7 So the four exhibits are 13, 14, 15, and
8 16. I believe Exhibit no. 16 was the one that was
9 provided in response to discovery.

10 CHAIRPERSON CAMPBELL: It was attached to
11 the motion to dismiss the phase II claim.

12 ARBITRATOR DAVIS: Correct.

13 CHAIRPERSON CAMPBELL: All right. Does
14 everybody have that information clear?

15 ARBITRATOR DAVIS: For purposes of the
16 transcript, Exhibits 15 and 16 were not marked in the
17 transcript yesterday. Should they be indicated now as
18 being marked?

19 CHAIRPERSON CAMPBELL: Please.

20 (Whereupon, the documents were
21 marked for identification as
22 MPAA Exhibit Nos. 15 and 16.)

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1 CHAIRPERSON CAMPBELL: All right. The
2 next order of business, Ms. Kessler, we're glad you
3 are back.

4 THE WITNESS: So am I.

5 CHAIRPERSON CAMPBELL: We need an
6 explanation for the record, please, regarding those
7 two letters from Brian Lacey dated April 5, 2000. One
8 of those letters had two numbered paragraphs in it.
9 That was included with the motion to dismiss the phase
10 II claim. The second was a three paragraph letter
11 that you presented for evidence yesterday. Again,
12 that was the exhibit 14.

13 We would like to know from your
14 perspective how did it happen that these two letters
15 from Brian came to your office. Was there any
16 disclosure to your knowledge during discovery or are
17 you aware of any disclosure regarding those, and any
18 reasons why or why not?

19 THE WITNESS: I don't have a copy of the
20 other letter.

21 CHAIRPERSON CAMPBELL: We will hold a
22 moment to allow them to gather that up. I'm sure

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1 someone has a copy here.

2 THE WITNESS: I need the two paragraph
3 one. I have that one.

4 CHAIRPERSON CAMPBELL: She has a copy. We
5 just provided one. We'll give you a minute to take a
6 look at those and refresh your memory there.

7 THE WITNESS: I'll tell you what I can
8 remember. With respect to disclosure of the letters,
9 I don't have a recollection of providing or not
10 providing. With respect to the difference between the
11 two letters, I am going to make an assumption that I
12 think is correct, but I am not positive.

13 When we looked at the case that IPG had
14 filed, we immediately became aware of two things.
15 Number one, that both MPAA and IPG were asserting that
16 we represented Lacey Entertainment. Secondly, I am
17 sure that I recognized the title America's Dumbest
18 Criminals as a program that has been claimed by an
19 MPAA represented company.

20 If I have to reconstruct this, my guess is
21 that I first wanted to clarify the position with Lacey
22 so that MPAA could either say we do represent Lacey or

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1 we don't represent Lacey.

2 I think my second objective certainly
3 would have been to determine the status of America's
4 Dumbest Criminals. Was that something that Lacey
5 claimed? I knew for a fact it was one of our
6 company's titles. So I just wanted to get that sorted
7 out. So my guess is that the intent of one of the
8 letters would have been to determine who represented
9 the company. Secondly, to determine the status of
10 America's Dumbest Criminals.

11 CHAIRPERSON CAMPBELL: And do you have any
12 recollection of what happened during discovery, how
13 and why one letter was attached to a motion and the
14 other one wasn't or that --

15 THE WITNESS: I don't have a recollection,
16 specifically about these letters. However, my guess
17 is that when I was hunting down discovery documents,
18 I have a file for each company, and that I went
19 through there and that these were not there and I
20 didn't look in another place, where probably obviously
21 these letters resided.

22 CHAIRPERSON CAMPBELL: Fair enough.

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1 MR. OLANIRAN: Your Honor, may I address
2 the specific discovery request that I think Mr.
3 Lutzker referenced yesterday?

4 CHAIRPERSON CAMPBELL: Mr. Olaniran, that
5 would be delightful.

6 MR. OLANIRAN: Mr. Lutzker listed about
7 ten different discovery, about ten different discovery
8 requests, but the only specific discovery request that
9 pertained to Lacey was the initial discovery request,
10 number 14, which requested documents underlying our
11 representation of Lacey. We did give them it very
12 early on as part of our response to their very first
13 discovery request, the rep agreements pertaining to
14 Lacey.

15 The two letters that are being offered
16 into evidence now arose after we filed our testimony.
17 Certainly Ms. Kessler would not have used their letter
18 in preparing her testimony since the particular
19 dispute didn't arise until after testimony was filed.
20 So that's probably why the letters are dated after the
21 date that we filed the testimony.

22 CHAIRPERSON CAMPBELL: Thank you.

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1 MR. LUTZKER: May I have an opportunity to
2 respond?

3 CHAIRPERSON CAMPBELL: Mr. Lutzker?

4 MR. LUTZKER: As I indicated to Mr.
5 Olaniran yesterday, as I look through our initial
6 discovery requests, which were dated April 19, 2000,
7 several weeks after the dates of both these letters,
8 we requested all documents used underlying or used to
9 prepare Exhibit 1, which as you know, is the listing
10 of all the claimants represented by MPAA in this
11 proceeding.

12 The response to that, interestingly, was
13 the only documents responsive to this request are the
14 1997 claims filed at the Copyright Office. They are
15 readily available to IPG.

16 Ms. Kessler has just testified that she
17 has files on claimants. I would just state for the
18 record that we received no documents from any of those
19 files, that I am aware of.

20 Now separately, there was a specific
21 request with respect to Lacey. There were several
22 other requests that go to the origin relationship of

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1 the entities involved in Exhibit 1, which includes
2 Lacey in the MPAA case. Our definition of documents,
3 both parties in defining documents for purposes of
4 these discovery requests, have very broad definitions,
5 including correspondence, electronic mail, faxes,
6 notes, memorandum, and the like.

7 CHAIRPERSON CAMPBELL: Mr. Lutzker, can I
8 ask a question? You requested all documents
9 underlying the claims?

10 MR. LUTZKER: All documents underlying or
11 used to prepare Exhibit 1. That was one request. All
12 documents underlying or constituting the
13 representation agreement between MPAA and each entity,
14 together with all explanatory documents regarding such
15 representation and the distribution methodology among
16 valid claimants.

17 All documents underlying MPAA's claim that
18 it has been granted authority to represent each entity
19 identified in Exhibit 1 in connection with the cable
20 royalty proceeding, together with all explanatory
21 documents and correspondence underlying that
22 authority.

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1 The response, incidently, was documents
2 responsive to this request will be provided to you.

3 ARBITRATOR COOLEY: Excuse me, but what is
4 the date of the document request?

5 MR. LUTZKER: April 19th of 2000, two
6 weeks after the date of both of these letters.

7 Then in addition, because we knew that
8 there was a specific dispute. I'll read some more.
9 Mr. Olaniran suggested that we had multiple requests.
10 Indeed, as I told him yesterday, the requests that we
11 submitted had redundancy to them as is perhaps typical
12 in these proceedings. But another document, all
13 documents underlying the identity of each entity
14 listed in Exhibit 1, including the business corporate
15 names, addresses, and so forth. They refer back to
16 the CARP filings that were made at the Copyright
17 Office.

18 Returning specifically to Lacey, we had
19 the following requests. All documents underlying
20 MPAA's representation of Lacey Entertainment and the
21 claimants for Garfield and Friends, and Jack Hanna's
22 Animal Adventures, Exhibits 1 and Exhibit 3 Kessler

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1 testimony.

2 Response. Program suppliers will make
3 available documents responsive to this portion of the
4 request concerning Lacey Entertainment and Garfield
5 and Friends. No responsive documents exist for Jack
6 Hanna's Animal Adventures.

7 As I said, I referenced to Mr. Olaniran
8 last night as we were sort of going through this a
9 number of other requests that we feel certainly could
10 have in a reasonable interpretation of this embraced
11 the documents. Clearly all documents underlying the
12 representation of Lacey or claimed to representation
13 of Lacey would undoubtedly have included these
14 documents.

15 The mere fact that the document which is
16 identified as Exhibit 16, I believe, the two paragraph
17 document, was attached as an attachment to a pleading
18 is not responsive to A, the document request. These
19 were, as you recall, or I'll explain, these were the
20 initial requests. Documents received in response to
21 these requests are then subject to follow-up requests.

22 Now I am making an additional assumption

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1 because as I proceeded in the course of this, we take
2 whatever is given to us at face value, which is I
3 think the appropriate way to proceed. If we receive
4 a document and have an inquiry about it, we then
5 proceed. If we don't have an inquiry about it, the
6 document speaks for itself. The response should be
7 complete on its face in connection with the request.

8 As Ms. Kessler has said, there are files
9 that she has with respect to perhaps each of the
10 claimants. Certainly she said it with respect to
11 Lacey. Whether there are any other documents in
12 there, we don't know. Whether the request for the
13 letters of April 5, either or both of them, have
14 underlying documentation is also unknown.

15 In other words, was this entirely based --
16 if it was entirely based on a phone call for which no
17 notes, no communications other than the telephone call
18 were made, that would be one thing. If it was made --
19 if there was a preceding request in writing from MPAA
20 to Lacey for a letter. If this, if the text of the
21 letter was drafted or prepared by representatives of
22 MPAA, that I would think should be disclosed. At

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1 least that would be my position.

2 Again, no documentation has been proffered
3 in discovery. This is the first time we have seen it.
4 I mean aside from the peculiarity of the same letter
5 dated the same day with substantively two paragraphs
6 in one and three paragraphs in another, independent of
7 any questions that that raises, the process of
8 disclosure is one that we have a concern. This
9 clearly, I think, is embraced within the parameters of
10 what should have been provided in discovery.

11 CHAIRPERSON CAMPBELL: Mr. Lutzker, I have
12 a question for you in the interest of time due to the
13 fact that we don't have with six months in this entire
14 process. Yesterday you indicated that you had already
15 received representation agreement on Lacey and that
16 was not a problem. Do you really feel prejudiced by
17 anything else? I mean you know that the
18 representation agreement is there. It has been
19 signed.

20 MR. LUTZKER: Oh absolutely. As will be
21 explained later, IPG represented Lacey prior to the
22 MPAA document that was set forth as the representation

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1 agreement. MPAA knew that IPG represented Lacey at
2 that period of time. The circumstances -- I don't
3 have objection to the document because it was
4 proffered in discovery. We had an opportunity. It
5 was proffered as the sole, only document available
6 from Lacey and it speaks for itself. The document is
7 what it is. I am not going to protest that.

8 But in terms of any additional
9 documentation regarding Lacey, our position is clearly
10 it should have been provided in discovery. It wasn't,
11 and it shouldn't be tendered now.

12 I mean it doesn't prevent them from
13 dealing with the Lacey issue. It just prevents them
14 from using documents that -- I mean the discovery
15 rules here are very --

16 CHAIRPERSON CAMPBELL: We don't need to go
17 through the discovery rules. We don't really have
18 time for that. I just wanted to hear your position on
19 whether or not you felt you were prejudiced.

20 Ms. Kessler, may I hear from you?

21 THE WITNESS: May I just say two things to
22 clarify? One, I have a file on every claimant.

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1 Inside the file is a copy of their claim with the
2 claim number here so that I am certain that the
3 company filed a claim. A copy of the representation
4 agreement, and finally, the certification report.
5 Those are the files that I went through to respond to
6 the discovery request.

7 Also, contrary to what Mr. Lutzker is
8 saying, I had no idea there was a relationship between
9 IPG and Lacey prior to the filing of this testimony.
10 I did not know.

11 MR. OLANIRAN: I just wanted to clarify
12 again. I mean Mr. Lutzker and I apparently have a
13 different view of what is required to be produced in
14 discovery and what is not.

15 The question as far as discovery is
16 concerned is what did she rely on in preparing her
17 testimony. In this case specifically, what did she
18 rely on in asserting that MPAA represents Lacey. It's
19 the representation agreement.

20 Now if a dispute arises subsequent to the
21 filing of the testimony, that's not necessarily
22 something that -- that is not something, a document

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1 post-dated after the filing date of the testimony,
2 it's not something that's required to be produced in
3 discovery.

4 It may be offered, however, as to the
5 issue of whether MPAA represents Lacey or whether IPG
6 represents Lacey. Certainly they had at least the
7 first letter, which I think -- one of the letters is
8 a fax, and the other one is a hard copy, which may
9 account for the difference in the third paragraph.

10 But they certainly knew that Lacey had
11 been denouncing IPG as its representative very early
12 on. So to suggest now that something shady was going
13 on in discovery and we didn't provide a letter, Mr.
14 Lutzker should know that if Ms. Kessler did not have
15 the letter or did not use the letter as part of her
16 written testimony, she is not required to produce it.
17 We produced it when we had to, when the dispute arose
18 as to who represented Lacey.

19 CHAIRPERSON CAMPBELL: Mr. Lutzker, did
20 you have a response?

21 MR. LUTZKER: I think it's clear that the
22 Copyright Office has indicated that the document

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1 requests are not solely dependent upon the requirement
2 to provide documents. They are not solely dependent
3 upon what an individual entity actually looked at. If
4 they are relying upon any documentation that is
5 available from appropriate sources, it should be
6 provided.

7 With respect to this particular document,
8 in light of the timing of the proceeding, in light of
9 the circumstances of the case, the documentation with
10 Lacey did not materialize out of thin air. It was a
11 letter dated during this time period, would
12 undoubtedly have been part and parcel of the
13 representation claim and underlying work prepared by
14 MPAA. Whether the date of the letter is before or
15 after the filing of the direct case, it is related
16 specifically to the nature of the representation.

17 The narrowness with which MPAA is willing
18 to interpret the document provision rules have been
19 the subject of disputes that we've had throughout this
20 entire proceeding, and which have affected in
21 compulsion orders from the Copyright Office and from
22 this CARP.

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1 CHAIRPERSON CAMPBELL: Anybody else have
2 anything on that topic?

3 Can you give us just a couple of minutes?
4 We wanted to discuss the issue of those letters
5 privately. Thank you.

6 (Whereupon, the foregoing matter went off
7 the record at 10:08 a.m. and went back on
8 the record at 10:18 a.m.)

9 CHAIRPERSON CAMPBELL: Thank you for that
10 opportunity for us to have some discussion about the
11 exhibits that have been presented thus far.

12 At this juncture, we will receive all
13 exhibits thus far presented, with the exception of
14 Exhibits no. 10 and 11. We are reserving ruling until
15 later on those items.

16 (Whereupon, the documents
17 previously marked for
18 identification as Exhibit Nos.
19 13, 14, 15, and 16 were
20 received into evidence.)

21 We find that there was no intent with
22 regard to failure to disclose, regarding Exhibits 16

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1 and 14, which were the Lacey letters, and that under
2 section 251.48A of the rules, they are admissible.

3 But we remind both parties that the CARP
4 will give weight to all evidence presented as CARP
5 deems reasonable and appropriate under the
6 circumstances.

7 Did everyone get those exhibit numbers?
8 251.48 of the rules, Code of Federal Regulations,
9 251.48 subsection A.

10 MR. LUTZKER: In terms of the second
11 letter, was that Exhibit 16, was that formally
12 presented as an exhibit?

13 CHAIRPERSON CAMPBELL: I thought it was.

14 MR. POPHAM: I think that was, the two
15 paragraph letter. It was referred to as being
16 attached to the motion, but we did not present that.
17 We presented the three paragraph letter.

18 CHAIRPERSON CAMPBELL: Do you want to
19 withdraw that as an exhibit?

20 MR. POPHAM: No. We're quite happy with
21 it.

22 CHAIRPERSON CAMPBELL: Do you want to

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1 present that as an exhibit formally then?

2 MR. POPHAM: We will obviously make it,
3 yes. We're happy to do that. We have a copy here.
4 We'll have to make additional copies.

5 CHAIRPERSON CAMPBELL: Just make sure that
6 copies tomorrow for everybody. Then everybody will
7 have all the paper in their file.

8 All right, Ms. Kessler. Mr. Popham?

9 MR. POPHAM: Madam Chairperson, as loathe
10 as I am to dance around another twig instead of
11 focusing on a tree, much less the forest, I would like
12 to address -- I hate to say this, a discovery matter.

13 We received documents yesterday from --
14 this will be brief -- from Mr. Lutzker's office.
15 There are two matters relating to that. First of all,
16 the only document other than one of the business
17 organization documents we received is a representation
18 agreement marked redline between Worldwide Subsidy
19 Group and Golden Films Finance.

20 I guess my question for the record is, IPG
21 was ordered to produce documents relating to Sander
22 Carter Production, Raycom Sports, Flying Tomato Films,

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1 Funamation Productions, and Abrams Tentille
2 Entertainment. I just want to be sure I understand
3 the connection to one of those entities, if there is
4 one, for this particular document.

5 MR. LUTZKER: I'm sorry, Joe. I missed
6 the --

7 MR. POPHAM: I'm just trying to make a
8 connection between that document and the documents you
9 have already produced.

10 Mr. Lutzker has indicated to me that the
11 letter is unrelated, and therefore, a bonus, for which
12 we're grateful. Actually we are grateful for all the
13 documents.

14 But the order also required that if IPG
15 asserts that any documents exist -- excuse me, I'm
16 reading the wrong part. I just need to know that --
17 we need an assertion on the record from Mr. Lutzker
18 that there are no documents then relating to the
19 documents relating to the companies which were
20 actually at issue in the order.

21 CHAIRPERSON CAMPBELL: Mr. Lutzker, a
22 response?

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1 MR. LUTZKER: We responded as I indicated,
2 with a bonus document for MPAA. There were no other
3 documents that were required to be produced under the
4 order.

5 MR. POPHAM: The order relates to Sander
6 Carter Productions, Raycom Sports, Flying Tomato
7 Films, Funamation Productions, and Abram Tentille
8 Entertainment. All I'm looking for is since it wasn't
9 in your cover letter, is a statement for the record as
10 required by the order that there are no other
11 documents relating to these companies.

12 MR. LUTZKER: Correct.

13 MR. POPHAM: There are no other documents?

14 CHAIRPERSON CAMPBELL: Did you get, while
15 we're talking about that preliminary matter, did you
16 also get a response with regard to the corporate
17 status?

18 MR. POPHAM: We received I think five
19 additional documents relating to the business
20 organizations that -- ACG in particular, Artist
21 Collection Group in particular.

22 CHAIRPERSON CAMPBELL: All right. Any

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1 other preliminary items there?

2 One small matter, housekeeping matter, if
3 you will. We located a greaseboard that has a
4 printout feature. If we want to use that, we can just
5 roll it in here and give it a try. So if that becomes
6 an idea, it's just in the next room.

7 Now, Ms. Kessler, Mr. Popham, I think you
8 have the floor.

9 MR. POPHAM: Thank you.

10 DIRECT EXAMINATION (continued)

11 BY MR. POPHAM:

12 Q Ms. Kessler, picking up where we left off
13 yesterday.

14 A I have no idea where we left off
15 yesterday.

16 Q Well let me just ask a question to get us
17 back on track then. Can you tell us how many programs
18 roughly are included in the claims of MPAA-represented
19 program suppliers for 1997 cable royalties?

20 A Per our revised Exhibit 3, there are
21 approximately 3,700 titles.

22 Q Ms. Kessler, I believe you have Exhibit 3

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1 revised there in front of you?

2 A Yes, I do.

3 Q That reflects the revised list of program
4 titles?

5 A Yes, it does.

6 Q Thank you. Ms. Kessler, how does MPAA
7 determine that a claimant is the actual owner or
8 distributor of a claimed program?

9 A We go through what we call the
10 certification process. The process consists of a two-
11 part document. The first page is I guess you would
12 call it a form that MPAA has created, whereby the
13 claimant swears that it is entitled to receive
14 royalties by virtue of being either the direct owner
15 or a partner in the ownership or someone in the
16 corporation that owns the title.

17 Accompanying that statement is a computer
18 printout listing all of the titles for which MPAA is
19 prepared to compensate the claimant.

20 We instruct the claimant to look at the
21 tittles on the computer printout, scratch out with a
22 single line any that don't belong to them, make a note

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1 on the printout to add any if we've somehow missed
2 something, and to sign the statement, and return both
3 the statement and the printout to us before we'll give
4 them any money, before we'll pay them.

5 Q And in the event that there are two MPAA
6 represented program suppliers that certify entitlement
7 to the same program, what does MPAA do in that case?

8 A We do not play Solomon. We put the money
9 in an escrow account. The companies are left to
10 determining between them who is the appropriate
11 recipient for the monies.

12 CHAIRPERSON CAMPBELL: May I ask a
13 question in that regard? Sometimes two companies are
14 joint owners. When they both claim, does that occur
15 when either one has forgotten that they allowed the
16 other person to be the recipient and they would split
17 it among themselves, or maybe they just never decided.
18 Does that happen from time to time?

19 THE WITNESS: That happens. Actually, I
20 see about three -- I can predict three causes of
21 escrows. One of them is a similar circumstance to
22 what you have described, where both the producing

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1 company and the syndicating company have filed a
2 claim, and neither of them has cleared between the two
3 of them which of them will assert the claim. That's
4 one circumstance. I was going to speculate how many
5 times that happens, but I don't really know.

6 Another circumstance is what I would call
7 a case of mistaken identity, where we have -- I think
8 there are like six Heidis, and maybe several versions
9 of an old movie called The 39 Steps, and so forth. We
10 may not be clear on which company asserts the claim to
11 which Heidi. So rather than undertaking ourselves to
12 determine it, we'll say we've got this Heidi in
13 escrow. We're not sure whose it is, but if you'll let
14 us know whose Heidi this is, we'll be more than happy
15 to pay it.

16 The other one is a case, actually I don't
17 think it's true for 1997, but there are some
18 circumstances where a library will pass from one
19 company to another company. Company A will have the
20 rights through say September. Company B will have the
21 rights commencing October, November, December. They
22 will both -- we will put the funds in escrow, let them

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1 know that the money is there. Then they will come
2 back and say allocate the months of blah, blah, blah
3 to Company A, the remainder of the year to Company B.

4 So sometimes, it's not a true dispute.
5 Sometimes it's sorting out data, determining who has
6 the rights, that sort of thing.

7 CHAIRPERSON CAMPBELL: Thank you.

8 BY MR. POPHAM:

9 Q Ms. Kessler, does MPAA, when it pays out
10 royalties, deduct any fees or expenses from the
11 royalties that are paid to claimants?

12 A We deduct our expenses prior to making the
13 distribution. We also have a small schedule of fees
14 for maintaining escrow accounts.

15 Q Could you just describe briefly what
16 expenses are included?

17 A We deduct both our actual out-of-pocket
18 expenses, plus MPAA overhead from the royalties that
19 are distributed to all companies. We have a really
20 good rate of expenses. The lowest year I ever had,
21 probably won't see again for a while, but it was 0.87
22 percent of our royalties.

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1 My expenses currently I believe are
2 somewhere between 2 and 3.5 percent of the royalties.
3 So we consider this to be a very low ratio of expenses
4 to revenues.

5 Q Just for the sake of completeness, the
6 overhead expense which I assume was involved here,
7 your office so to speak --

8 A My office, salary, telephone, photocopier,
9 internet, that sort of thing.

10 Q All right. I believe MPAA also has some
11 enforcement activities?

12 A We do. Up until recently, we had a
13 fulltime position devoted to contacting cable systems
14 when we believe they haven't filed in compliance with
15 the act, and asked them to either explain their filing
16 or bring their royalty fee payment into compliance.

17 That position changed to part-time
18 recently, but we will deduct the salary for that
19 person, half of the salary of that person.

20 Q Just to be clear, the enforcement
21 activities as well as the royalty collection and
22 distribution activities are included in that overhead?

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1 A That's right. The reason is because any
2 monies that we recoup from the enforcement activities
3 we pay directly to the companies who file claims for
4 that particular year.

5 Q Ms. Kessler, for what types of programs
6 does MPAA claim cable royalties?

7 A We have a wide variety of programs in our
8 claim. I have listed a number of them on pages six
9 and seven. I am not going to go through the entire
10 list, but just sort of give you an outline of the
11 kinds of programs.

12 I know in my mind when I think of
13 syndicated programming, the first thing I think of is
14 half-hour sitcoms. So we certainly have our share of
15 sitcoms in our claim, such as Seinfeld, which I
16 believe went into syndication in 1997, along with Mad
17 About You. We have some of the older ones like I Love
18 Lucy and the series MASH.

19 We have cartoon programs like Garfield and
20 the Simpsons. We have dramas. We have game shows.
21 We have news programs and instructional programs like
22 the Wall Street Journal Report, and Bill Nye Science

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1 Guy. Talk shows, variety shows. We have info-
2 mercials, awards programs. Then we have miscellaneous
3 programs, such as fireworks shows, Christmas specials,
4 Easter specials, music videos, that sort of thing.

5 Q Ms. Kessler, what would be some of the
6 pertinent characteristics of series that distinguish
7 it from other types of programming?

8 A A series is something I think we all know
9 immediately what we're talking about, but when you
10 come to defining it, it is difficult.

11 I would say that a series is a show with
12 continuing episodes, has the same cast, and the
13 viewing public becomes familiar with the life of the
14 people within the fiction of the series.

15 In terms of programming, usually
16 broadcasters put them on -- they strip them, which
17 means they place them in a regular time slot, Monday
18 through Friday, maybe in a regular slot sometime
19 during the weekend. A series will have multiple
20 episodes. A successful series I think has well over
21 100 episodes. I know we have some that have as many
22 as 200 episodes in our claim. That sort of thing.

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1 Q What other sort of programming would
2 comprise MPAA's claim? I guess I should clarify here.
3 Rather than say programming owned by MPAA-represented
4 companies, I am going to just call it MPAA programming
5 to avoid cluttering the record, extra words there.

6 So what type of programming would comprise
7 MPAA's claim other than series?

8 A Well, even though series account for
9 approximately 500 of our 3,700 titles, the remaining
10 titles are movies.

11 Q In contrast to series, how would movies be
12 scheduled?

13 A Movies in general do not get the kind of
14 exposure or usage that a series does. Let me just use
15 the example of MASH. We know that there's a series
16 MASH and we know there's a movie MASH. If you'll look
17 at Exhibit 3 Revised, on page 9, actually I'm not sure
18 it's page 9 -- yes, it's 9.

19 We see the listing for the movie MASH. We
20 see that during 1997, it had just under 3,500
21 individual broadcasts of the episodes comprising the
22 series MASH.

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1 If you turn later in the exhibit to the
2 movie portion, on page 53, you'll see that the movie
3 MASH had three broadcasts during 1997. So when I say
4 that a series program has a lot more exposure, that is
5 an example of it. Whereby the series had thousands
6 and thousands of broadcasts, the movie only had three
7 during 1997.

8 Q Ms. Kessler, just quickly, I would call
9 your attention to Exhibit 4 of your original
10 testimony.

11 A Yes.

12 Q Could you just very briefly describe that,
13 please?

14 A This is a two-page exhibit entitled "The
15 top 50 movies ranked by number of broadcasts, 1997."
16 What I did was I took the movies that were broadcast
17 during 1997, and I ranked them from most broadcasts to
18 least.

19 The first movie on the list, I have got to
20 tell you, I never heard of before, but it's Point Man.
21 It had 48 broadcasts during 1997, which is not quite
22 one a week, but it is certainly close to one a week.

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1 If you look at number 23, Who Framed Roger
2 Rabbit, you see that that movie was broadcast 26 times
3 during 1997. Or almost every other week somewhere in
4 the United States, some distant subscriber had the
5 opportunity to view Who Framed Roger Rabbit.

6 If you look at the last -- I wouldn't call
7 it the last, but 50th movie in that exhibit, you see
8 Accidental Tourist, which had 22 broadcasts during
9 1997. So that's not quite one every other week, but
10 it certainly is if you look at the bottom of our list,
11 some of the movies in our list, they had one
12 broadcast.

13 So to see that something has 22 broadcasts
14 or 26 broadcasts or 40-some broadcasts, you can see
15 that these movies in our claim certainly did get a lot
16 of exposure during 1997.

17 Q Ms. Kessler, talking a little more about
18 series programming, I would call your attention to
19 your Exhibit 5. Could you just again describe briefly
20 what Exhibit 5 illustrates?

21 A Exhibit 5 is the top MPAA series ranked by
22 distance subscribers. And by MPAA series, just to

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1 follow your decision, Jim, was the certainly not owned
2 by MPAA but movies in our claim ranked by the number
3 of distant subscribers who had access to these
4 programs, who could have watched these series during
5 1997.

6 The one that came in first was Star Trek:
7 Deep Space 9 at just under 70 million subscribers.
8 The one that came in at the -- not at the bottom, but
9 of the list that I looked at was a series called Click
10 with 1.9 million subscribers.

11 Q Ms. Kessler, how does MPAA determine which
12 programs were retransmitted as distant signals by
13 cable systems?

14 A We have a standing order for television
15 station logs from a company called TV Data, which is
16 in upstate New York. When we are ready to do a
17 distribution, we pick a sample of stations upon which
18 our distribution will be based, and we rely on the
19 program logs from TV Data to supply us with the
20 program names.

21 Q I think it's more than well known now that
22 the order for '97 consisted of 130 television

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1 stations, the original order from TV Data.

2 A I believe that's correct, yes.

3 Q But how many stations did you actually
4 analyze in developing the list for '97 royalties?

5 A I used 82 stations for our distribution
6 and, therefore, our evidence here at -- before the
7 Panel.

8 Q And how were those stations selected?

9 A I asked TV Data -- I'm sorry. I asked
10 Cable Data to provide me with a listing of broadcast
11 stations that were retransmitted on a distant basis by
12 Form 3 cable systems during '97. Again, Form 3s,
13 because they contribute the most money to the pool and
14 they are available to the widest number of distant
15 signal subscribers. I picked I believe any station
16 that had 90,000 plus distant signal subscribers during
17 '97.

18 Q And now, does this include every program
19 or every broadcast of every program carried on a
20 distant signal basis by every cable system in '97?

21 A No, it doesn't. In terms of our evidence,
22 it -- the evidence relies on the stations that were in

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1 our distribution, which were the 82 stations. But we
2 certainly believe, based on the selection of those
3 stations, that we have hit virtually all subscribers
4 and accounted for generally all of the money that was
5 paid into the fund during that time.

6 Q And is there any other reason that you
7 wouldn't include every station?

8 A If we were to include every station, not
9 only would it be cumbersome but I would spend all the
10 royalty money in purchasing and processing data. I
11 think during 1997 there -- I hope I'm remembering this
12 correctly, but I think there were approximately 1,800
13 stations operating in the United States during '97.

14 Many of those were non-commercial
15 stations, and so for this purpose we wouldn't be
16 interested in them. Of that, probably maybe 700 are
17 carried anywhere as a distant station. But, again, to
18 order and process data for 700 stations would eat up
19 all of our -- my expenses wouldn't be at two and a
20 half percent or whatever. They would be, I'm sure,
21 substantially higher.

22 So in order to reduce not only the amount

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1 of money or the amount of work, but the availability
2 of royalties to the claimants, we pare it down to the
3 ones most heavily retransmitted during '97.

4 Q Thank you. Now, Ms. Kessler, early on you
5 alluded to five reasons why MPAA deserves virtually
6 all of the royalties. Let's talk about the first
7 reason. What is that?

8 A In my judgment, the first reason has to do
9 with distant signal viewing to our programs relative
10 to the IPG group.

11 Q And does MPAA ever conduct such an
12 analysis?

13 A We didn't conduct specifically an analysis
14 for MPAA relative to IPG. We undertook to get our
15 Nielsen data to make our distribution. Based on our
16 distribution -- the data that we had gathered for the
17 distribution, I was able to do calculations that would
18 show the relative shares to each of the parties.

19 Q And, again, what is the source of the
20 viewing data that you rely on?

21 A The viewing data come from two sources.
22 May I have my -- I just want the one with the Nielsen

1 study. The big ones, yeah. I want the one in your
2 left hand.

3 MR. POPHAM: While we're dealing with
4 mechanics, just as a housekeeping matter, I assume we
5 want to maintain the integrity of it as it was first
6 done and then as it's marked up as a second exhibit we
7 now have recorded.

8 CHAIRMAN CAMPBELL: Since you are
9 recording the smaller versions.

10 Is that all right with you, Mr. Lutzker?

11 ARBITRATOR DAVIS: Perhaps we could use a
12 different color pen.

13 THE WITNESS: I'm a quilter after all, Mr.
14 Davis.

15 MRS. POPHAM: I've already taken a picture
16 of it as it is now and drawn a sketch of it as well.

17 CHAIRMAN CAMPBELL: Great. Thank you.
18 The color today, though, is red.

19 THE WITNESS: The relevant color is red
20 today.

21 CHAIRMAN CAMPBELL: The blue color we used
22 yesterday, for the record.

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1 MR. POPHAM: We're going to match that to
2 her dress color perhaps? I'm noticing a correlation
3 developing.

4 CHAIRMAN CAMPBELL: Color coding.

5 THE WITNESS: You'll remember when I was
6 talking about the Nielsen study yesterday I said that
7 the Nielsen study provides us with information with
8 respect to commercial and non-commercial stations for
9 -- and using the information from the study, we could
10 determine on each of those stations which of their
11 programs were local programs, which were movies and
12 series, which were live sporting events, which were
13 devotional programs, which were PBS programs, and then
14 the all other category.

15 For purposes of our distribution, we
16 extract data -- red -- only with respect to the movies
17 and the series. And now, after all that work, I'm
18 going to take this piece of paper down.

19 Now, you may recall yesterday that when I
20 was talking about the Nielsen study -- if I didn't say
21 it yesterday, then let me stress it today -- that the
22 data that come to us from the Nielsen company are only

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1 for the so-called sweep periods, which means the
2 months of February, May, July, and November.

3 For some markets, but not all, in the
4 United States -- need some more colors -- Nielsen also
5 has diary data for January and October. Let me
6 concentrate on these months first.

7 If you'll look at my exhibit on page 8 --
8 I'm sorry -- at my testimony on page 8, you'll see a
9 discussion of household viewing hours.

10 For each series and movie from the Nielsen
11 study, we calculate the household viewing hours
12 attributable to that program. And if you'll look at
13 the -- I guess I would say the lower third of page 8,
14 you will see the household viewing hour formula, which
15 reads, "The sum of the quarter hours divided by four,
16 multiplied by the average number of distant cable
17 households that actually viewed the program, the
18 result is household viewing hours."

19 And then, I -- in the following paragraph,
20 I've explained it in plain language. QH are quarter
21 hours or 15-minute segments. You add the quarter
22 hours up and divide them by four to express them as an

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1 hour, in an hourly measurement.

2 Then, you multiply them by the average
3 number of distant cable households that actually
4 watched the program on that station during that time
5 period. The number -- the average number of distant
6 cable households is per the Nielsen data for, let's
7 say, January, February, May, July, October, and
8 November.

9 Well, we now have six months for which we
10 don't have any viewing. So what we have done is we
11 have devised a method of interpolating viewing by
12 three methods. One is called straight-line method,
13 one is moving backward in time, and one is moving
14 forward in time. And these are all ways to estimate
15 the level of viewing that occurred in the months for
16 the programs for which we do not have Nielsen data.

17 So, let me find another color. So for
18 March and April we would do interpolations. For June
19 we would do an interpolation. For August and
20 September we would do an interpolation. And for
21 December we would do an interpolation.

22 Also, Ms. Campbell, I believe you asked

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1 yesterday whether a month is a Monday through Friday
2 thing, or whether --

3 CHAIRMAN CAMPBELL: A week.

4 THE WITNESS: -- it's a week, right, how
5 does it go. In reality, this is not January 1 through
6 31. I don't know what it was in '97, but my guess
7 would be that the January period would have begun the
8 first Thursday in January, which means that it would
9 have as a calendar matter -- we would call some
10 calendar dates in February part of the January period.

11 Similarly, the February sweep would have
12 begun on the first Thursday of February and would
13 have, as a calendar matter, included some days from
14 March, and so forth. I got off track. What did you
15 ask me?

16 BY MR. POPHAM:

17 Q How do we use the --

18 A Oh, okay. How we do --

19 Q How do we use the data?

20 A So for each program that was broadcast by
21 any of the 82 stations during these periods, we
22 accumulate household viewing hours either by relying

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1 specifically on data from Nielsen or relying on our
2 interpolation methodology to assign the viewing hours
3 to that particular program.

4 Then, for purposes of our distribution, we
5 add up all of the household viewing hours attributable
6 to the programs in our claim. This is a hypothetical,
7 but if all of those household viewing hours for all of
8 the programs in Exhibit 3A equaled 100, and I owned a
9 show that got one hour, I would get one percent of the
10 funds.

11 In reality, as you can see, our
12 denominator is in the three -- I think it's the three
13 billion range. And we allocate the money according to
14 the percentage that each company gets of the total
15 viewing.

16 Q And, Ms. Kessler, is it also possible to
17 analyze several categories of MPAA represented
18 programming, IPG represented programming, perhaps
19 unclaimed programming, and then contested programming
20 even?

21 A Yes, it is possible. I have provided
22 information for all of those categories except one

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1 that you said. I don't have the unclaimed. I could
2 get the unclaimed, but I don't have it in our data.

3 Q Unclaimed would be left out because it's
4 essentially irrelevant to the proceeding.

5 A Exactly. There is no party who has
6 asserted a claim for those programs. Yes. If you
7 look at Exhibit 3B, you'll see where I've done that
8 analysis.

9 Q Ms. Kessler, I believe in addition to 3B
10 you've also summarized the result on page 9 revised of
11 your testimony.

12 A Yes, I have.

13 Q Could you just tell us what the result
14 was?

15 A In terms of just the MPAA share alone, the
16 household viewing hours attributable to the
17 programming claimed by MPAA is 3,476,221,654. The
18 total viewing of all titles claimed by the MPAA group,
19 the IPG group, and titles claimed by both groups,
20 equals 3,477,272,694. If you express the MPAA
21 uncontested share as a percentage, it's 99.9698
22 percent.

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1 Q Are there any other results that you would
2 care to describe from the viewing analysis, or are we
3 done there?

4 A I would like to talk about 3B. Okay.
5 Returning to Exhibit 3B, this is a summary of viewing
6 hours, the Program Supplier group relative to the IPG
7 group, which also includes an allocation for titles
8 claimed by both groups. The first line of information
9 is the program supplier viewing hours but exclude the
10 titles claimed by both parties. With respect to MPAA,
11 the number is 3,474,810,364, or 99.9292 percent.

12 The next section of the exhibit details
13 the titles that are claimed both by the MPAA group and
14 by the IPG group. These titles include a movie called
15 The Commitments, Dragon Ball Z, Dramatic Moments in
16 Black Sports History, Dream Big, Garfield and Friends,
17 Jelly Bean Jungle, Parenting of the '90s, PE TV, Shaka
18 Zulu. And Victim of Love is not exactly a contested
19 title, but we'll talk about that later.

20 The total of the contested titles is 1.4
21 million household viewing hours. Then, the remaining
22 portion of the exhibit are the titles that are claimed

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1 by IPG, and they equal 1,051,040. So in terms of the
2 three groups of titles, claimed either by MPAA or by
3 IPG or by both, the total in viewing hours is
4 3,477,272,694. MPAA's share of that uncontested,
5 99.9292 percent; the contested share, 0.0406 percent.

6 MPAA asserts a claim to all of the titles
7 in the contested list. And if you include those with
8 our allocation, the percentage is 99.9698 percent.
9 The allocation to IPG in terms of a percentage share,
10 0.0302. If you add together all of those categories,
11 100 percent.

12 Q Thank you, Ms. Kessler. You have
13 referenced earlier on in your bullet, looking to the
14 matter of distant subscriber data and fees generated,
15 and I believe that's reflected in Exhibit 7.

16 A That's right.

17 Q And just for the record, Ms. Kessler,
18 where did you obtain the distant subscriber data?

19 A There is a company in Bethesda called
20 Cable Data Corporation about whom we have talked in
21 these proceedings. Cable Data goes to the Copyright
22 Office -- comes to the Copyright Office and looks at

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1 every single statement of account filed by cable
2 operators during the pertinent period.

3 And they record on laptop computers,
4 without the use of electricity, the information from
5 the statements of account -- the owners, number of
6 subscribers, rate, stations carried, revenues, and
7 royalty fee payments.

8 They then can express the filings of the
9 cable systems in terms of the numbers that we see here
10 in this exhibit.

11 Q And what does the analysis in Exhibit 7
12 show?

13 A If you look at 7, you'll see that there
14 are two categories of data in the exhibit. The one on
15 the left-hand side of the page is three columns, which
16 shows a group of data ranked by subscribers. If you
17 look on the right-hand side of the page, you see the
18 same group of data, only this time organized by fees
19 gen.

20 What these stations are are television
21 stations that broadcast MPAA series during 1997. For
22 each station that broadcast a series, I compiled

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1 information with respect to the number of distant
2 subscribers who had access to the program, as well as
3 the fees generated by cable system distant carriage of
4 that station.

5 If you go to the last page of the exhibit,
6 which is page 31, there's a summary of the data. On
7 the line reading "Total," in terms of distant signal
8 subscribers you see that the stations that carried the
9 MPAA programs were available to 107,919,853. That's
10 107.9 million subscribers.

11 According to Cable Data, there were
12 108.5 million subscribers to -- who had distant
13 signals available to them. If you take as a
14 percentage the subscribers who had access to the MPAA
15 programming as a percentage of subscribers who have
16 access to all distant signal programming, you'll see
17 that those that had access to the MPAA programming
18 were over 99 percent, or 99.4540.

19 If you look at the data on the right-hand
20 side of the page -- as I said it's the same group of
21 data, it's just sorted differently by fees generated
22 -- you'll see that for the privilege of carrying

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1 distant signals cable operators paid a total of
2 \$71,303,988. And by the way, this is for the second
3 half of the year.

4 Stations that cable operators chose to
5 carry, and which had MPAA programming on them,
6 accounted for \$70,979,868 in royalties, or a
7 percentage of 99.5454 percent.

8 One thing that I would like to say about
9 this exhibit is that I believe that it understates the
10 exposure of our programs as well as the royalties
11 attributable to stations that carried our programs.
12 The reason is that this analysis was based on series
13 programs and not all of the series programs. It
14 included no movies whatsoever.

15 I'm confident that if I did this analysis
16 for all of the series and all of the movies in our
17 Exhibit 3 revised, we would have 100 percent of the
18 shares of subscribers and royalties.

19 Q Ms. Kessler, just by way of explanation,
20 could you expand a little bit on the concept of "fees
21 generated" or fees gen?

22 A Certainly. I said yesterday there's buzz

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1 words all over the place with this, and fees gen is
2 one of those buzz words. Fees gen or fees generated
3 is a calculation that was developed by Cable Data and
4 which has been used in CRT and CARP proceedings, I
5 don't want to say since the beginning of time but
6 certainly over a long history of time, which is a
7 calculation to determine how much money of the royalty
8 fee was attributable to individual stations.

9 You remember yesterday when I drew the
10 picture of the royalty fee payment, or the
11 calculation, that I did the example of a cable system
12 that carried two independents and three network
13 affiliates for a total of 2.75 DSEs. And then I
14 explained for the first DSE the operator pays a
15 certain percentage, for the second, third, and fourth
16 he pays a lower percentage, and for all DSEs beyond
17 four he pays an even lower percentage of his gross
18 receipts.

19 It is a very difficult matter to determine
20 which station represents which DSE. For example, a
21 cable operator could carry four network affiliates.
22 So how would you say which one accounted for the first

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1 DSE? But together they account for that.

2 So just to give you a simple example, if
3 a cable system carried two different independents and
4 paid \$100 in royalties, the fees gen calculation would
5 be \$50 per station. In other words, it would just be
6 divided evenly between those. That was the process
7 that was undertaken by each cable system -- by each
8 Form 3 cable system that carried these stations.

9 Q Is fees gen a new concept, Ms. Kessler?

10 A No, it's not. As I said, I wish I could
11 remember the first proceeding in which it was used,
12 and I just don't. But it has been -- it's now -- I
13 think it's stipulated that parties accept the concept
14 of fees generated.

15 MR. POPHAM: There's scratch in Ms.
16 Kessler's voice. I'm confident that I can finish
17 before lunchtime even with a short break. Could we
18 maybe take five minutes?

19 CHAIRMAN CAMPBELL: That would be fine.
20 And if you need to get some water or whatever, feel
21 free to do so. Thank you.

22 (Whereupon, the proceedings in the

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1 foregoing matter went off the record at
2 11:08 a.m. and went back on the record at
3 11:24 a.m.)

4 CHAIRMAN CAMPBELL: Mr. Popham, I think
5 you were talking with Ms. Kessler.

6 MR. POPHAM: We are quite ready to
7 continue.

8 BY MR. POPHAM:

9 Q Ms. Kessler, just to fill out the history
10 a little bit, how long has MPAA acquired data from
11 Cable Data for purposes of distribution?

12 A I believe royalty year 1979 was the first
13 year, and we have used them all years since then.

14 Q And the same question in terms of Nielsen.

15 A 1979, the first year. We have used all
16 years since then.

17 Q Ms. Kessler, moving to page 11 of your
18 testimony, just so we have a point where to pick up
19 here, can you tell us about any other information that
20 you've compiled indicating the value of MPAA
21 programming?

22 A I have compiled data with respect to the

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1 license fees paid by broadcasters for our programming,
2 and I've compiled data with respect to advertising
3 fees paid for spots on our programming.

4 Q And where do we find that in your
5 testimony?

6 A Starting with page 11 and going through
7 page 13.

8 Q And also Exhibit 8.

9 A And Exhibit -- what is that exhibit?

10 Q 8.

11 A 8. Okay. Thank you. The reason that I
12 did that was -- was to try to find analogous
13 marketplaces by which we could make some judgments
14 about the value of the MPAA programs. I don't mean to
15 sound dramatic, but essentially the marketplace for
16 1997 retransmitted royalties is here in this room for
17 180 days. It will be what happens here that
18 determines the value of the programs and the relative
19 value of the programs represented by MPAA to those
20 claimed by IPG.

21 One way I thought to do this, like I said,
22 was to look at analogous marketplaces, one of which

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1 might be the broadcast industry.

2 When a broadcaster buys -- remember, I had
3 the piece of paper with the circle, 35-mile circle
4 yesterday. When broadcaster purchase programming, in
5 general only one broadcaster per market can buy that
6 show. So, for example, here in Washington, D.C., if
7 Channel 5 buys Seinfeld, then any other station
8 generally will not be permitted to buy Seinfeld.

9 The price that is paid is, in general,
10 predicated on the anticipated viewership within that
11 35-mile zone. And so the price is negotiated based on
12 anticipated viewers.

13 When -- I lost my track. You did, too.

14 (Witness laughs.)

15 CHAIRMAN CAMPBELL: I believe you were
16 looking at the marketplace value. You were taking a
17 look at a variety of --

18 MR. POPHAM: Thank you.

19 THE WITNESS: Right. So what I thought to
20 do was to look at the prices that broadcasters and
21 cable networks pay for programming.

22 Let me say something about cable networks.

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1 Cable networks reach fewer viewers than broadcast
2 stations in the aggregate do. As a consequence, cable
3 networks will generally pay less for syndicated
4 programming than broadcasters in the aggregate do.
5 And let me go back and do more buzz words for a
6 minute.

7 Remember that the royalties that we're
8 talking about here are royalties for programs that are
9 on free, over-the-air television stations, such as WGN
10 in Chicago, WNOL New Orleans, and so forth. When I
11 talk about a cable network I'm talking about a
12 programming outlet whose programming is available only
13 via cable. So such an outlet might be the American
14 Movie Channel or USA Network, Bravo, Lifetime,
15 etcetera.

16 I'm not going to go through all of these
17 examples on pages 12 and 13, but maybe I'll just
18 highlight maybe one or two of them. If you look on
19 page 12 at the second show discussed, we're talking
20 about the fees that were paid for programming. And we
21 see that USA Network paid \$75 million for the off-
22 network rights to Walker, Texas Ranger. At the time

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1 of the sale, analysts predicted the show could wind up
2 generating as much as \$1 million per episode.

3 Just to give you another buzz word -- off-
4 network. Walker, Texas Ranger I believe premiered on
5 the CBS network. We call that the network run. Once
6 it's off network, it's syndicated. That's the meaning
7 of that word in that context.

8 That was the fees paid by USA Network,
9 which is a cable network, for a syndicated program.
10 If you look at the last example on page 12, you see
11 Mad About You, predicted to sell for \$125,000 per week
12 in New York.

13 Actually, I like another one on there, the
14 fourth one down, Seinfeld and Home Improvement. Fees
15 estimated to be \$3 million to \$4 million per episode.

16 With respect to sales of these two shows
17 during 1995, Home Improvement had been sold in 180
18 stations, Seinfeld in 190.

19 Let me stop just for a minute. I didn't
20 say this yesterday, one of the things I would like to
21 say, that the process of syndication is trying to
22 place your show on as many different stations

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1 nationwide as possible. So we see here that these two
2 shows, which are both included in the MPAA claim, had
3 a broad reach -- 180 stations, 190 stations.

4 Home Improvement license fees were
5 estimated at about \$3 million per episode, and
6 Seinfeld's were estimated to be between \$2.5 million
7 and \$3 million per episode.

8 I'm going to anticipate a question, and
9 that would be, "Well, these are fees paid in 1995.
10 What relevance would that have to 1997?"

11 When a program supplier sells a program to
12 a station, it is generally for a fixed period of time,
13 say four to maybe seven years, for a fixed number of
14 runs of each episode. Therefore, any kind of license
15 deal that was made in 1995 most assuredly would have
16 been carried forward into the 1997 period that we're
17 talking about here today.

18 Do you want me to say anything else more
19 about broadcasting?

20 BY MR. POPHAM:

21 Q Well, I think you've -- you haven't spoken
22 about license fees and advertising revenue as well.

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1 A Okay. Advertising revenue. If you look
2 at the following page, page 13, I've given four
3 examples of the amount that advertisers paid
4 broadcasters to advertise their products in those
5 slots. We saw that Home Improvement and Seinfeld were
6 the two shows that were discussed in the previous page
7 -- that they are 30-second spots. And by 30-second
8 spot we mean in availability for commercial
9 advertising, sold for \$130- to \$140,000. Spots for
10 The Simpsons and Mad About You, almost \$90,000 a week
11 -- I'm sorry -- each.

12 And I just have to bring up my favorite
13 show, Xena: Warrior Princess. Her -- advertisements
14 on her show were between \$50,000 and \$60,000 each.

15 Again, these are shows that were most --
16 number one, they were sought after by broadcasters.
17 They were the most popular programming. The
18 broadcasters wanted these shows on their stations
19 because they felt like they would command high
20 advertising revenues.

21 And in terms of the amount of revenue, in
22 terms of ad time that they did generate, these are

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1 wonderful figures. These are great availability
2 spots.

3 Q Thank you, Ms. Kessler. Let us turn down
4 the home stretch now to Exhibit 9 of your testimony.
5 Can you just briefly describe what Exhibit 9
6 comprises?

7 A Exhibit 9 is -- was my foray onto the
8 internet to look at best of lists, top 100 lists, that
9 sort of thing, just to see what the web was reporting
10 about syndicated programming.

11 If you look at the first one in there,
12 which is a website from Ultimate TV --

13 CHAIRMAN CAMPBELL: I have a question for
14 you, please.

15 THE WITNESS: Yes, ma'am.

16 CHAIRMAN CAMPBELL: Are any of these sites
17 MPAA-sponsored sites?

18 THE WITNESS: No, ma'am.

19 CHAIRMAN CAMPBELL: Thank you.

20 THE WITNESS: The first one is actually a
21 Tribune site. And if you turn three pages into the
22 exhibit, you'll see a listing of the top 100 TV shows

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1 of all times. And the TV shows are listed on the
2 pages that follow, and you'll see that there are
3 certain shows that have been circled in handwriting --
4 and I did that -- and these are shows that are in the
5 MPAA claim.

6 They include I Love Lucy, MASH, which
7 we've already talked about, Alfred Hitchcock, Beverly
8 Hillbillies, Roseanne, Odd Couple, Star Trek Voyager,
9 etcetera.

10 You'll notice that not all of the programs
11 are circled. I would like for you not to infer that
12 these are not owned by our companies. Just to give
13 you an example, number 18 is ER, which is on the NBC
14 network. It has not -- at least in 1997 had not gone
15 into syndication. Therefore, it wouldn't be a program
16 that would be eligible for royalties, and we would not
17 have asserted a claim for it.

18 Another show like number 11, The Carol
19 Burnett Show, is not there because none of the 82
20 stations in our distribution group broadcast the
21 station. However, I'm confident that if that program
22 had been broadcast during 1997 that one of our

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1 represented companies would have asserted a claim for
2 it.

3 If you'll turn -- certainly, look at the
4 next one after that, but I wanted to look at the one
5 -- the third one in there, which is the all-time box
6 office leaders. These are the top 10 American films,
7 unadjusted and adjusted for inflation.

8 Let me correct myself, Madam Chairman.
9 This one is a Dow Jones listing, and Dow Jones is, I
10 believe, a represented company. However, the Dow
11 Jones program is not on here. Yes, Dow Jones is a
12 represented company.

13 CHAIRMAN CAMPBELL: But MPAA didn't have
14 anything to do with creating the site?

15 THE WITNESS: That's correct.

16 CHAIRMAN CAMPBELL: All right.

17 THE WITNESS: That's correct.

18 You'll see that, again, the titles are
19 listed, and that many of them have been circled. And
20 I did the circling. And the purpose of the circling
21 was to show which of these movies, which are the
22 top 100, are included in the MPAA claim. So we have

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1 Star Wars, Jaws, Back to the Future, Snow White and
2 the Seven Dwarfs, just a sampling of those.

3 I don't recall how many I circled, but the
4 point of circling was to show the number that are
5 included in the MPAA claim. And I would just make the
6 same observation regarding the titles that are not
7 circled. I would not want for you to believe that the
8 fact that it's not circled means that we do not assert
9 claims for it; rather, that they were not broadcast
10 under the appropriate circumstances with respect to
11 1997.

12 I'm confident that if we did look at the
13 owners of those programs they would be claimants
14 within the MPAA group.

15 BY MR. POPHAM:

16 Q I believe this also includes some
17 information on Evergreens.

18 A Right.

19 Q Just speak briefly about Evergreens.

20 A Well, I've mentioned MASH a couple of
21 times. I've mentioned I Love Lucy. I've mentioned
22 Andy Griffith -- I haven't mentioned, but I'm thinking

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1 of The Andy Griffith Show. There is possibly the
2 temptation to scoff at old programming, to minimize it
3 as unimportant, as something of no consequence.

4 That has actually been -- our experience
5 has actually been quite the opposite. It has been our
6 experience in these royalty distribution proceedings,
7 and in the distribution of royalties in general, that
8 these old shows are broadcast year in and year out,
9 and that they are the part and parcel of the libraries
10 of our companies who make claims.

11 Look on page 15, and I give you some
12 examples, such as I Love Lucy, Leave It To Beaver,
13 Green Acres, Alfred Hitchcock, which is one of my
14 favorites, Perry Mason, which is one of my favorites.

15 If you look at MASH, MASH premiered in
16 1972. Now, this is kind of hard. I graduated from
17 college in 1972. The fact that something is now an
18 Evergreen from my youth makes me feel old. But,
19 nonetheless, that is now considered because of its
20 significant run to be an Evergreen program. It has
21 generated a billion dollars, \$600 million of it coming
22 from syndication sales.

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1 The fees from -- for MASH in terms of
2 syndication went from \$250,000 per episode in 1979 to
3 \$900,000 in 1985, and to \$1.1 million per episode in
4 1989. So despite the fact that something has had a
5 long run, both network and syndicated, does not
6 necessarily indicate that its value diminishes. If
7 anything, I would say that the value increases.

8 In terms of The Andy Griffith Show, it
9 went into syndication in 1968, and it's still out
10 there. They have -- it has spawned products like the
11 Mayberry Catalog, which went into its second edition,
12 and Aunt Bee's Kitchen Collection Cookbook sold almost
13 a million copies.

14 Again, these are programs that certainly
15 have had a long run, but they continue to be popular
16 and people respond to them. I don't know what else to
17 say.

18 Q Ms. Kessler, thank you. I think you've
19 said almost quite enough. But just to wrap this up,
20 and at the risk of being repetitive perhaps, what --
21 why is the evidence you've presented pertinent to the
22 value of distant signal programming to cable operators?

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1 A Again, it's pertinent because we need to
2 create a marketplace. We need to -- the final
3 analysis is that when we leave these proceedings there
4 is a finite amount of royalties to be allocated, and
5 presumably it will be done on some sort of relative
6 share, X amount for the MPAA group, Y amount for the
7 IPG group.

8 The evidence that I've given in terms of
9 the actual consumption of our programming, in terms of
10 the distant signal viewing, in terms of the number of
11 distant subscribers, which is close to 100 percent, in
12 terms of royalty fees generated, also close to 100
13 percent, in terms of the high license fees generated
14 by the purchase of our programming by broadcast
15 stations and cable networks, the high advertising
16 fees.

17 All of these I believe support the fact
18 that our programming was the most widely used during
19 1997, and that our allocation should be very close to
20 100 percent.

21 Q Ms. Kessler, thank you very much.

22 MR. POPHAM: We just have I think a couple

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1 of housekeeping matters pertinent to Ms. Kessler's
2 testimony at this point.

3 CHAIRMAN CAMPBELL: One second, please.
4 Okay.

5 Mr. Popham, you had some questions or
6 housekeeping matters or details?

7 MR. POPHAM: Yes. Two matters. First of
8 all, let me report that in terms of the Spelling,
9 Paramount, Viacom, Big Ticket claim, we have attempted
10 to reach Cortez Smith. We have -- they have asked for
11 some information from us concerning claims. We have
12 provided that, and we anticipate continuing that
13 conversation today in order to be able to provide the
14 clearest information we can to you on that.

15 CHAIRMAN CAMPBELL: Mr. Lutzker, would it
16 be all right with you to reserve that portion of it?

17 MR. LUTZKER: Sure.

18 CHAIRMAN CAMPBELL: Thank you.

19 MR. POPHAM: Secondly, we have received
20 the signed copy of the letter from Alliance, which is
21 the match to I think MPAA Exhibit 10, the unsigned
22 letter. I guess it's easiest if we just mark this

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1 perhaps as MPAA Exhibit 17. That's the next number.

2 Or we can --

3 CHAIRMAN CAMPBELL: We never accepted it.

4 MR. POPHAM: It's not accepted. That's
5 true.

6 CHAIRMAN CAMPBELL: For the record, the
7 other one is identified I believe as Exhibit 10. Is
8 that correct? We will not accept that as an exhibit,
9 just as an identified document, and this will be
10 Number 17. That way there's no question about what we
11 discussed yesterday and how this new item appeared.

12 (Whereupon, the above-referred
13 to document was marked as MPAA
14 Exhibit Number 17 for
15 identification.)

16 MR. POPHAM: Just to identify this, this
17 is a letter dated December 20, To Whom It May Concern,
18 from Eric Birnberg, Senior Vice President, Business
19 and Legal Affairs, Television, at Alliance Atlantis
20 Communications, Inc. I've placed a copy before Ms.
21 Kessler.

22 CHAIRMAN CAMPBELL: A question here. Mr.

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1 Lutzker, did you have a question?

2 MR. LUTZKER: Yes. I'd like to sort of
3 renew an objection. The letter that's being -- I
4 guess this is Exhibit 17 -- purports to come from
5 Alliance Atlantis I guess, speaking of a merger
6 between Alliance Communications Corp. and Atlantis
7 Communications. Atlantis Communications is the
8 subject of the -- if I recall, the concern.

9 Atlantis Communications was a client.
10 There is no Alliance Communications Corp. identified
11 as an MPAA-represented company, unless --

12 THE WITNESS: I can tell you that that is
13 the same company as Alliance International Releasing
14 Ireland Limited.

15 MR. LUTZKER: I appreciate Ms. Kessler's
16 attempt. But the correspondence was intended to
17 address the very specific issue. And oral testimony
18 -- I mean, I don't know if we have to go through the
19 process of whether, you know, oral testimony, or how
20 this is to be identified, but I would renew the
21 objection on the grounds that this document doesn't
22 relate to the claimant.

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1 MR. POPHAM: Perhaps we ought to ask Ms.
2 Kessler the question of how she knows that Alliance
3 Communications Corporation and Alliance International
4 Releasing Limited are the same company.

5 THE WITNESS: I know that through -- not
6 through any corporate documents that I've ever seen.
7 But in my conversations with the fellow I was
8 describing in London, I told him of our difficulty
9 with respect to Atlantis, and this is the information
10 that he supplied to me.

11 CHAIRMAN CAMPBELL: So let me ask a
12 question here. We now have a company known as
13 Alliance Atlantis. We have a question as to -- that
14 has been placed by Mr. Lutzker as to whether, as a
15 result of the amalgamation mentioned in this
16 Exhibit 17, whether the surviving company is, in fact,
17 a valid claimant.

18 Ms. Kessler is under the understanding
19 that it is as a result of another merger, another
20 purchase, or what?

21 THE WITNESS: No. My opinion is based on
22 the fact that both Alliance and Atlantis separately

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1 file claims. So their claims are valid. Their claims
2 are valid. They are in the Copyright Office roster of
3 filed claims.

4 The issue, as I understand it, is MPAA's
5 assertion that we represent the Atlantis Company. And
6 what I have said is that it was my understanding,
7 which is confirmed by this letter, that the claimant
8 Atlantis was assumed by the claimant Alliance.

9 I didn't get the representation agreement
10 because the allocation of funds for that claim by us
11 as a bookkeeping matter will be made to the Alliance
12 Company. So that I don't think there's an issue of
13 the valid claim. I think the -- I'm confident that we
14 represent Atlantis. It's not a question to me.

15 CHAIRMAN CAMPBELL: Let me just make sure
16 I have this down. Alliance and Atlantis separately
17 filed claims.

18 THE WITNESS: Yes, ma'am.

19 CHAIRMAN CAMPBELL: No question on that.

20 THE WITNESS: Correct.

21 CHAIRMAN CAMPBELL: On anybody's part?

22 MR. LUTZKER: Yes. Question, because

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1 Alliance International Releasing Ireland Limited, is
2 the only Alliance listed in their group. Alliance
3 International Releasing Ireland Limited, it's my
4 recollection -- I don't have -- I was actually going
5 to thumb through the motion, but the motion wouldn't
6 have it.

7 When we were provided copies of
8 representation agreements during the course of
9 discovery, when we eventually got signed
10 representation agreements, there was an agreement,
11 it's my recollection, from Alliance International
12 Releasing Ireland Limited. And, therefore, their
13 status as a represented entity, we accepted it, you
14 know, at face value.

15 There was no agreement with Atlantis
16 Communications, and we filed a motion to dismiss on
17 that basis.

18 Similarly, with Big Ticket, there was no
19 signed representation agreement. It was represented
20 that the companies that Alliance -- excuse me, that
21 Atlantis was somehow part of a third-party claimant,
22 and the chain of title would be established. This

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1 document --

2 CHAIRMAN CAMPBELL: That wasn't my
3 question.

4 MR. LUTZKER: Yes. This document --

5 CHAIRMAN CAMPBELL: That wasn't my
6 question. Can we get there? First, I'm trying to
7 find out, did Alliance and did Atlantis both file a
8 claim?

9 THE WITNESS: Yes, ma'am.

10 CHAIRMAN CAMPBELL: That was my question.
11 I'm not talking representation agreement yet.

12 MR. LUTZKER: No, I'm --

13 CHAIRMAN CAMPBELL: Are you saying they
14 did not file a claim?

15 MR. LUTZKER: I have no knowledge -- and
16 I don't know whether Ms. Kessler has knowledge,
17 although it -- this is a -- when you say "Alliance,"
18 give me the full name there. It's not Alliance. This
19 is Alliance Communications Corporation, and the
20 claimant is Alliance International Releasing Ireland
21 Limited.

22 CHAIRMAN CAMPBELL: We have -- I'm not

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1 worried about what's represented. That's the second
2 issue. The first issue are the names of the filed
3 claimants. Do you happen to have that with you?

4 THE WITNESS: No.

5 CHAIRMAN CAMPBELL: If not --

6 THE WITNESS: But I can go down the hall
7 and get it.

8 CHAIRMAN CAMPBELL: That's what I was
9 about to say. At the lunch break, then I would
10 recommend that we get copies, which they will allow
11 you to have --

12 THE WITNESS: Certainly.

13 CHAIRMAN CAMPBELL: -- of the claims for
14 whoever -- whatever Alliance party filed, and whatever
15 Atlantis party filed.

16 THE WITNESS: Right.

17 CHAIRMAN CAMPBELL: It's a valid question
18 to be concerned about the corporate nature and the
19 corporate structure and which actual corporation
20 filed.

21 Now, we do have --

22 MR. LUTZKER: We have a copy in --

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1 CHAIRMAN CAMPBELL: One moment. We do
2 have a letter here, and it's the MPAA Exhibit 17, that
3 speaks to Alliance Communications Corporation and
4 Atlantis Communications, Inc. They, as part of a
5 statutory plan of arrangement, became wholly-owned --
6 Atlantis Communications, Inc. became a wholly-owned
7 subsidiary of Alliance. And the name was amended; the
8 Alliance Corporation's name was amended to Alliance
9 Atlantis Communications, Inc. I'm reading from the
10 Exhibit 17.

11 The question on the table at this point,
12 I understand, is that there are two claims for some
13 Alliance entity and some Atlantis entity. And I
14 believe that Mr. Lutzker says he has a copy of those
15 claims?

16 MR. LUTZKER: We have copies of the
17 Atlantis claim and the Alliance claim.

18 CHAIRMAN CAMPBELL: For the record, will
19 you read the name of the corporation that -- and you
20 might want to go to the signature page, if the claim
21 has a signature page.

22 MR. LUTZKER: The signature is Alliance

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1 International Releasing Ireland Limited, signed by
2 Roman D-O-R-O-N-I-U-K, Director. There is a
3 Schedule A attached, which lists -- was filed on its
4 own behalf and others.

5 And there is an Alliance Communication
6 Corp. in Toronto that is listed, and Alliance
7 Releasing Corp. in Toronto, and Alliance Distributing
8 Corp. in Beverly Hills, and Alliance Independent Films
9 in Toronto, and Alliance Production, formerly Alliance
10 Entertainment, in Beverly Hills, Alliance Production
11 in Toronto, Alliance Distribution in Toronto, and
12 Alliance Releasing Distribution Services -- these are
13 all corporations -- in Toronto. There may be others,
14 but -- so --

15 THE WITNESS: I don't understand the point
16 of --

17 CHAIRMAN CAMPBELL: The issue?

18 THE WITNESS: Yes.

19 CHAIRMAN CAMPBELL: The issue is a
20 corporate entity filed. It was not the corporate
21 entity that is listed as one of your program
22 suppliers. I presume that's the issue.

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1 And now, we have run into this name game
2 issue many times in the course of the CARP proceeding
3 as well as the pre-CARP proceedings. In all fairness
4 to MPAA, I would hope that all parties would allow the
5 MPAA representatives to have an opportunity to discuss
6 this issue with either Eric Birnberg of Alliance
7 Atlantis or some other representative who can help
8 sift through this.

9 There may be a DBA issue here. There may
10 be all sorts of detailed corporate machinations of
11 which no one here is apprised at this moment. And I
12 don't think that Mr. Lutzker --

13 MR. LUTZKER: I have no objection, you
14 know -- I understand -- I mean, I -- clearly, this was
15 something which perhaps could have been addressed,
16 and, you know, Ms. Kessler will be available the next
17 day or so until the testimony is closed.

18 If they can come back with adequate
19 documentation -- I don't want to deny a claimant -- if
20 there is a legitimate claimant that filed a claim and
21 is a -- its claim is absorbed by another claimant
22 that's a proper claimant, I have no objection to that.

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1 CHAIRMAN CAMPBELL: Thank you.

2 MR. LUTZKER: I mean, I think they deserve
3 the money. That's --

4 CHAIRMAN CAMPBELL: And there is a
5 legitimate claimant. We just need to see how that
6 legitimate claimant fits into this corporate system,
7 and you'll have the opportunity to find that out.

8 MR. POPHAM: Thank you.

9 CHAIRMAN CAMPBELL: Thank you.

10 Now, was there anything else? You had a
11 couple of items.

12 MR. POPHAM: That was it. Just those two.

13 CHAIRMAN CAMPBELL: All right. What we
14 would like to propose first is, because we're
15 finishing the direct here, it seems like this would be
16 a timely moment to break, unless you have objections
17 and want to start the cross.

18 MR. LUTZKER: I don't know. In the
19 interest of time, it may be -- I don't know how we
20 want to sort of organize the break.

21 CHAIRMAN CAMPBELL: We're talking about
22 lunch.

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1 MR. LUTZKER: I understand.

2 CHAIRMAN CAMPBELL: Okay.

3 MR. LUTZKER: It's fine to break now.

4 CHAIRMAN CAMPBELL: I think, strategy-
5 wise, as far as getting started again, and for you
6 getting your brain into responding to a different set
7 of questions, I think it would be easier to break now
8 than to begin for an hour or a half an hour and then
9 break again.

10 And during that break, the MPAA people
11 have several things they're going to be working on as
12 well as lunch.

13 Mr. Lutzker, the Panel had a question for
14 you, or at least a recommendation. We have been
15 reviewing the testimony of Lindstrom from Nielsen as
16 noted in the MPAA direct case, as well as Von
17 Schilling and Kalcheim. There are several items
18 mentioned in the direct case, and we hope that you've
19 had a full opportunity to read all of those, because
20 during our analysis of that material it appears to
21 address many of the issues you raised and questions
22 you've raised.

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1 So we just recommend that. You may have
2 already read it all. But regarding underlying data
3 concerns and diaries, there is much explanation there
4 that might already provide you answers, and it's
5 already been presented as an attachment in addition to
6 that direct testimony.

7 MR. LUTZKER: The short response that I
8 will give to that, since we have reviewed that
9 material, does in part relate to the fact -- I mean,
10 there are two sets of proffered documentation in the
11 designated testimony. One set of documents, which
12 embraces Mr. Lindstrom's and Mr. Von Schilling's
13 testimony, occurred in the 1992 to 1995 satellite
14 proceeding.

15 These were -- this was testimony that was
16 not subject to cross examination. Motions were filed
17 at the time the direct case was submitted. The
18 Copyright Office allowed, under its rules, the
19 designation of testimony, but recognized that the
20 according weight and assessment of that documentation
21 must be reflected on the fact that it was not part of
22 a fully prosecuted proceeding.

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1 That would not be the case -- actually,
2 the CRT proceeding I think was an aborted proceeding,
3 if I --

4 CHAIRMAN CAMPBELL: But I think the --
5 under the Docket Number CRT 91289, the 1989 cable
6 royalty distribution proceeding, there was direct and
7 rebuttal with exhibits. And for information purposes,
8 it is available for review.

9 MR. LUTZKER: Absolutely.

10 CHAIRMAN CAMPBELL: And certainly appears
11 to answer a lot of the questions that you raised
12 yesterday as well as in prior times. So what we're
13 just saying is hopefully you have had the opportunity
14 to review that, because it certainly adds a great deal
15 of information to this proceeding that it sounded like
16 yesterday was not available.

17 MR. LUTZKER: Well, as --

18 CHAIRMAN CAMPBELL: And we just want for
19 the record to state that, so that it's clear that that
20 information is available, particularly the direct and
21 rebuttal testimony of several witnesses.

22 MR. LUTZKER: And just to conclude the

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1 point, the methodology is present, and how it is
2 developed is in prior proceedings. The application of
3 a new set of facts, a new set of signals, a new set of
4 circumstances, and a new set of criteria with respect
5 to the choice of signals, stations, and the like, does
6 result in changes in an analysis.

7 And for our purposes, we sort of maintain
8 the concern, despite the fact that we understand that
9 there is a methodology, we understand there are error
10 factors, we understand one can draw relationships to
11 how data is collected. At the same time, in this
12 specific proceeding where specific numbers are
13 addressed and specific data is being utilized, the
14 inability to have access to the prior data we maintain
15 is a serious problem.

16 And based upon the prior proceedings,
17 those parties had opportunity, and in some instances
18 were given much of the same information. They were
19 given it in that proceeding, and we are not -- we have
20 not been given it in this proceeding. And that's the
21 nature of our concern.

22 I understand the methodology. I

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1 understand the problems. The difficulty is that we
2 can't test the validity of the particulars of this
3 proceeding unless we were given that information.

4 CHAIRMAN CAMPBELL: Thank you for that
5 clarification.

6 MR. LUTZKER: And that's all I've tried to
7 say.

8 CHAIRMAN CAMPBELL: Are there any other
9 issues that need to be raised at this moment?

10 Maybe we'll come back here about 1:20.
11 That will give everyone a chance to do some research
12 and background and allow you to prepare for your
13 moment.

14 Thank you very much.

15 (Whereupon, at 12:03 p.m., the
16 proceedings in the foregoing matter went
17 off the record for a lunch break.)

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1 A-F-T-E-R-N-O-O-N P-R-O-C-E-E-D-I-N-G-S

2 (1:29 p.m.)

1 CHAIRMAN CAMPBELL: All right. Do we have
2 any preliminary matters since lunchtime?

3 MR. POPHAM: Just to mention we are
4 assembling pieces of the puzzle. We don't have the
5 last page, so until we're totally confident we have
6 everything --

7 CHAIRMAN CAMPBELL: I didn't realize Mr.
8 Olaniran wasn't here. And I think he's out there on
9 a call, so if we can take it off the record until he
10 pops in, I think --

11 (Whereupon, the foregoing matter went off
12 the record at 1:30 p.m. and went back on
13 the record at 1:33 p.m.)

14 CHAIRMAN CAMPBELL: Glad you're back.
15 We're back on the record. And as there are no
16 preliminary matters, Mr. Lutzker can move forward with
17 cross.

18 CROSS EXAMINATION

19 BY MR. LUTZKER:

20 Q Ms. Kessler, I'd like to sort of just for

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1 a start, to start out and understand your role and
2 responsibility with respect to the direct case that
3 MPAA has presented in this procedure.

4 Did you write this case, or is the
5 testimony that you've presented here -- the testimony
6 that you personally drafted?

7 A I wrote the testimony myself.

8 Q Did you have any assistance in drafting
9 that?

10 A Certainly the people at Morrison & Hecker
11 did editing. But I wrote the testimony.

12 Q And in terms of each of the exhibits, did
13 you personally prepare each of those exhibits?

14 A Personally, or with the help of others.

15 Q I'll let you sort of -- so we have a --
16 you know, I'm just referencing -- the first is the
17 list of the program representing claimants.

18 A I can file that myself.

19 Q The subscribers and royalty payments, '97
20 fund.

21 A From CableData Corporation.

22 Q From -- explain that first.

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1 A They're the people who compile information
2 from statements of accounts at the copyright office.
3 And they put together analyses, I guess I would say,
4 of revenues, fees gen, subscribers, et cetera. That
5 information came from them.

6 Q Did they put that information together
7 based on your request?

8 A I would say probably not, as I believe
9 they're standard reports, but I'm not sure about that.

10 Q So you didn't request that information is
11 your recollection?

12 A I don't recall whether I did or didn't,
13 but it would be available to me as a subscriber,
14 regardless of what --

15 Q But in connection with the preparation of
16 this testimony -- in other words, did you recall
17 whether you had this -- the document upon which this
18 is based already in hand, or whether you requested
19 that in connection with the preparation of this?

20 A I don't recall.

21 Q With respect to the list of program
22 titles?

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1 A That was compiled for us by CableData,
2 based on our distribution.

3 Q Based on your distribution?

4 A Of royalties.

5 Q Can you explain that further?

6 A Certainly. Are you talking about Exhibit
7 3 or Revised 3?

8 Q I'm starting with Exhibit 3, but I'll also
9 talk about Revised 3.

10 A Okay. Excuse me. We -- at the time that
11 I wrote the testimony, as I indicated earlier, we had
12 not gone through the certification process. So I was
13 not sure -- in fact, not sure -- nothing. I didn't
14 know among all of the titles that were broadcast in
15 1997, which of those for certain were claimed by our
16 represented companies.

17 So in terms of the title list, I sorted
18 them to owners, as the owners had existed in the
19 previous year, which was '96.

20 Q Let me interrupt you at that point. How
21 did you sort? You said you sorted them to owners.

22 A Well, let me give you an example. If you

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1 look at -- let me find one that I feel like I'm -- if
2 you look at "All in the Family", if "All in the
3 Family" had been claimed by Columbia in 1996, I sorted
4 it to Columbia for 1997 purposes.

5 Q I'm just trying to understand, sort of,
6 the processing and steps.

7 A Okay.

8 Q This is -- before the proceeding -- before
9 the preparation of the direct testimony, this listing
10 in Exhibit 3, did that exist in any form that you had
11 solicited?

12 A No.

13 Q In terms of the titles, how do you know --
14 how did you start -- how did you know the titles that
15 were within the 1997 potential claim list?

16 A That data came from our TVData program
17 logs.

18 Q And I'm going to get into that in more
19 depth, but just narrowly, the data that comes from
20 TVData, you order data -- you personally that data?

21 A We have a standing order of at least
22 possibly five years, but it's more likely ten years

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1 with them.

2 Q The standing order says what?

3 A Send us these station title lists, or
4 station program logs.

5 Q Are the stations the same every year?

6 A Yes.

7 Q So --

8 A I'm sorry, yes.

9 Q The stations do not change from year to
10 year?

11 A It's possible that I will every couple of
12 years revise the list of stations, but to my
13 knowledge, I know we rewrote our contract with them X
14 number of years ago. I don't know the answer to the
15 question. It has been a standing order for a long
16 time.

17 Q Is that an order that you initiated?

18 A Yes.

19 Q And earlier in the proceeding, you're
20 aware that we had this issue regarding 130 logs --
21 station logs, is that --

22 A Right.

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1 Q -- the 130 stations -- are those the ones
2 that you're referencing in the standing order?

3 A That is correct.

4 Q In connection with the 1999 -- 1997
5 proceeding, you made no changes to your recollection
6 regarding the --

7 A To my recollection, I made no changes.

8 Q So a request of -- or a list of stations
9 is present at TVData, and you contact them and ask for
10 the station logs for 1997?

11 A You're giving it more sophistication than
12 it actually has. Whatever the order is, it is. They
13 send them automatically without prompting or --

14 Q Did they send them in 1998, or 1999, or --

15 A Concurrent with the week. We get them on
16 a weekly basis.

17 Q So you had one on a weekly basis. You
18 receive these logs -- are they in printed form or
19 computer form?

20 A The answer for '97 is different than the
21 year 2000. What would you like?

22 Q Well, let's start with '97.

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1 A For '97, they were on mag tape is my
2 understanding.

3 Q In other words, calendar '97?

4 A Correct.

5 Q And the TVData logs that have been
6 provided -- or that are provided to you, they're on
7 mag tape, and then they evolved into a different --
8 during -- for the '97 period, they were mag taped the
9 entire year?

10 A As far as I know, yes.

11 Q And mag tape is what?

12 A I don't know. It is a very old method of
13 delivering electronic data. I think it looks like an
14 old time movie, strips of magnetic tape that with data
15 embedded in it.

16 Q And does this go to MPAA?

17 A No.

18 Q And where does it go?

19 A CableData.

20 Q Directly to CableData?

21 A Correct.

22 Q And when it goes to CableData, who

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1 receives it?

2 A The individual is no longer there, but
3 it's my understanding it was the programmer, the
4 person who did the programming who received the tapes.

5 Q And did you give instructions to that
6 person to prepare any information for you in
7 connection with the list of programs?

8 A No.

9 Q You didn't give any instruction?

10 A Not to the programmer.

11 Q To anyone else at -- at CDC?

12 A The President, Tom Larson.

13 Q And what did you -- how did that -- I
14 don't want to over sophisticate it, so --

15 A Okay.

16 Q Tell me the process.

17 A I asked him for a listing of series and
18 movies that were broadcast during '97. And to the
19 extent that we knew who the owners were in '96 to
20 apply the same ownership in '97 as we had in '96.

21 Q And so, Mr. Larson's company has TVData
22 mag tapes for 1997?

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1 A As far as I know, yes.

2 Q You've never -- you don't go to see them?
3 You don't look at that many?

4 A No.

5 Q And you've never seen them?

6 A That's not true. I have -- he has a vault
7 over there.

8 Q Yes.

9 A And in the vault, he stores data.

10 Q Yes.

11 A So I have been in the vault, and I've seen
12 rows --

13 Q Seen rows of --

14 A -- mag tapes. Whether they were -- what
15 year they're for, I don't know.

16 Q But you don't --

17 A They might not even be ours. I mean, I
18 just don't know that.

19 Q Okay. So you've seen a vault, but in
20 terms of the 1997 listing of titles, this is material
21 that you solicit from CDC based upon the outstanding
22 requests from TVData. They send the logs -- they send

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1 the logs to CDC, and --

2 A Oh, no. Okay. I left out a step. By
3 that time, I knew the sample stations. So I wouldn't
4 have asked for titles for all of the TV stations. I
5 would have said, "Send me the titles that are in our
6 study."

7 Q And when you -- how do they know what
8 stations were in your study?

9 A When I send Nielsen the county analysis,
10 Nielsen does the thing, and they send the data to
11 CableData. So CableData gets the data.

12 Q Yes.

13 A And the stations are the stations.

14 Q Yes. And that's identified in
15 correspondence with CDC?

16 A I don't think I would send them the county
17 analysis. They would have no use for the county
18 analysis. So that would be something that I sent to
19 Nielsen.

20 Q You would send county analysis -- and
21 again, we'll get to Nielsen in a minute. But in terms
22 of -- in terms of the process of preparing this, for

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1 the original preparation of Exhibit 3, instructions
2 were given to Larson --

3 A Yes.

4 Q -- to prepare a list of titles of series
5 or movies from the magnetic tapes received from TVData
6 for the Nielsen station --

7 A Correct.

8 Q And that's it? And your involvement in
9 that process is in a sense behind the scenes. You
10 don't have any access to that data yourself --

11 A That's not exactly true. I cannot tell
12 you minutely what CableData does with the tapes, but
13 I can tell you some of the things they do with it.

14 One of the things they do on a weekly
15 basis, it's my understanding, is they first of all,
16 scan a tape to make sure that all quarter hours are
17 accounted for. Secondly, they run a routine so that
18 if a program is called, "The Lonesome Dove", the gets
19 put at the end, so that we can do alphabetical
20 listings of titles.

21 Certainly they must read the magnetic
22 tapes into the mini computer somehow. I don't know

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1 the process by which that happens, except that it
2 happens. And, okay, you asked what access I had to
3 the data.

4 If I wanted to see -- I have a system of
5 communicating on a -- via a modem with CableData
6 Corporation, whereby I can dial in, enter a series of
7 codes, and see -- I can call up a program, and see if
8 it was broadcast in '97.

9 I can't -- I don't have access to
10 household viewing hours. I can see who produces and
11 distributes it, who produced and who distributes it.
12 So it's passive access, I would say.

13 Q So let me understand this. You have,
14 through a modem connection and keyword passwords, the
15 ability to go into a portion of the CDC data. Is it
16 all the TVData logs that's translated from the
17 magnetic tape to an electronic form?

18 A Correct, yes.

19 Q So everything in TVData, you have personal
20 access to?

21 A I don't -- I think I only have -- I don't
22 know the answer to the question. But I believe, with

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1 respect to '97, I would have had access to the data
2 for the 82 stations, but not for the other stations.

3 Q Not for other stations -- I mean, is there
4 a reason -- I mean, do they segregate it, or --

5 A Yes. When I'm looking for distribution
6 purposes, all I care about are the stations in the
7 sample.

8 Q And so, -- okay. Your access to -- you
9 indicated a moment ago that you do not believe you
10 have access to the household viewing data?

11 A I know for a fact I do not have access to
12 the household viewing data.

13 Q Is that -- is there a reason for that that
14 you're aware of?

15 A I don't need it.

16 Q You don't need access to household viewing
17 data?

18 A No.

19 Q When you say household viewing data, what
20 do you mean?

21 A The database that I described above, which
22 is the household viewing hours attributable to each

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1 title.

2 Q That is -- that's the final information
3 which resulted from a separate process that, again,
4 we'll go into in somewhat more detail, but it's been
5 previously described.

6 In other words, 7,312 viewing hours for
7 "Adventures of Oliver Twist," to use a hypothetical,
8 that's a program that if it had 712 viewing hours --
9 it's that -- the final viewing hour total -- you're
10 familiar with -- let me put it in this context:
11 You're familiar with the document that was made
12 available called the Alpha List?

13 A Yes, I am.

14 Q Okay. That Alpha List has a listing of
15 programs, owners, viewing hours in particular, and
16 it's that final viewing hour total that you're
17 referencing now when you say household viewing hours?

18 A Right. When I go into -- and I'm talking
19 about going through the modem and looking at the data.
20 I do not have access to household viewing hours.

21 Q Does anyone at MPAA have access to viewing
22 hours?

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1 A No.

2 Q In the past, has anyone had access to
3 viewing hours?

4 A No.

5 Q Okay. Let me shift -- we'll get back to
6 --

7 CHAIRMAN CAMPBELL: Can I ask a question?
8 You don't have access to the viewing hours, then how
9 do you get that information, or from whence does it
10 come?

11 THE WITNESS: After we've gone through the
12 certification process, I will get a listing similar to
13 the Alpha List telling the household viewing hours for
14 each.

15 CHAIRMAN CAMPBELL: For the certified
16 programs?

17 THE WITNESS: Yes. Well, it's for each
18 company. So, for example, whoever the first one --
19 say All American. I would get All American has a
20 total of 100 household viewing hours.

21 So I literally word process, using
22 actually, Exhibit 1 for the company names, and then I

1 key in the household viewing hours. Then I calculate
2 a percentage share, multiply it times the dollars, and
3 pay the -- pay the -- write the check.

4 CHAIRMAN CAMPBELL: So you have no access
5 during the year when you get your weekly information?
6 But at the end, when you get certified titles, then
7 you have access. And that makes sense with the
8 certified titles, because you won't have them until
9 after the fact anyway, right?

10 THE WITNESS: Let me say, when I was
11 talking about having access, I was understanding it in
12 the context of being able to go online and looking at
13 viewing hours. I have no access at all to viewing
14 hours, whether it's before certification, after
15 certification, I have no access to viewing hours. All
16 I have access to are television program names and
17 dates of broadcast.

18 The final step in the distribution process
19 is to get the household viewing hours, from which I
20 just run a spreadsheet to calculate the company's
21 allocations.

22 CHAIRMAN CAMPBELL: That's the access of

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1 viewing hours that you get --

2 THE WITNESS: That's correct.

3 CHAIRMAN CAMPBELL: -- is when they give
4 you that after the certification. That's what I
5 wanted to make sure I had that clear. Thank you.

6 BY MR. LUTZKER:

7 Q Now, going back to this 19 -- this Exhibit
8 3, as originally produced.

9 A Yes.

10 Q The series and movies that are in here
11 come from where?

12 A The TVData program logs.

13 Q Okay. And the instructions to Larson in
14 preparation to your testimony was what?

15 A Based on our sample, give me the series
16 and movies that were broadcast in '97. And to the
17 extent we know who the owners were in '96, credit
18 those programs to the same owners in '97.

19 Q Was that instruction given to you in
20 writing, or a phone call, or email, or how was that
21 given?

22 A My guess is that it was probably in a

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1 telephone call. I would say telephone call.

2 Q And without -- you don't do any follow up,
3 or something? I mean, that just -- you call Tom
4 Larson --

5 A Right, yes.

6 Q And then -- and how does he know which
7 companies to identify, then?

8 A He knows who the claimants were for '96.

9 Q And how does he know who the claimants
10 were for '96?

11 A From the '96 certifications.

12 Q In 1996, how many claimants did MPAA
13 represent?

14 A I don't know.

15 Q In 1996, how many certifications from
16 claimants did MPAA have?

17 A I don't know.

18 Q Who holds physical title to these
19 certifications?

20 A You mean, who has the pieces of paper?

21 Q Yes.

22 A I do.

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1 Q You do? In the course of discovery, we
2 had asked for information. Are you familiar with
3 that?

4 A Yes, I am.

5 Q And presumably, you provided copies of all
6 the certifications that you had at that point in time.

7 A That's right. I recollect that we missed
8 two, possibly. But when you called our attention to
9 them, we supplied them.

10 Q Would it surprise you that there were less
11 than 60 certifications provided for 1996 during the
12 course of discovery?

13 A If that's what you counted, I don't have
14 a beef with that.

15 Q Yes. In terms of 1997, do you go through
16 the same process?

17 A We have.

18 Q And is that how you generated or revised
19 Exhibit 3?

20 A Exactly.

21 Q And in terms of the preparation of the
22 revised Exhibit 3, let me just sort of make sure I

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1 understand the process that -- there are some changes
2 to titles here.

3 A That's right. You mean, in terms of the
4 number of titles, or --

5 Q Well, the documents themselves -- one runs
6 81 pages, the other one's 84 pages. And there have
7 been -- it's described as Exhibit 3 Revised. And
8 there's a separate attachment, which I think is
9 Exhibit 3-A, that identifies additions and deletions,
10 and corrections, I guess.

11 A Yes, that's what the objective was.

12 Q And in preparation of this, you used the
13 1997 certifications?

14 A Right.

15 Q And when did you obtain access to the 1197
16 certifications?

17 A Probably very late October, early
18 November. Maybe even mid-November.

19 Q Of what year?

20 A Of 2000.

21 Q Of 2000. Some seven, eight months after
22 the filing of the direct case?

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1 A That's right.

2 Q Is there any reason to explain the --
3 claims are filed in 1990 -- July of 1998. Is there
4 any reason -- a notice of intent to participate in
5 this proceeding was submitted in the summer of '99.
6 Direct cases were filed in the spring of 2000.

7 Is there any reason to explain why the
8 certifications trail by almost three years -- well,
9 over two years, the filing of the claims?

10 A I can certainly tell you the process. We
11 pick our sample stations based on, as I said, the
12 highest number of distant cable subscribers.

13 Cable Systems made their second payment
14 for 1997 in March of -- March 1 of '98. It takes the
15 copyright office approximately three months to
16 photocopy all of the statements of account, and put
17 them out for CableData's people to code in.

18 I indicated earlier -- in fact, Greg and
19 I were over there today. They have one employee over
20 there who manually enters on the laptop computer,
21 which is not allowed to be plugged in.

22 Q If I could just interrupt one second. I

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1 mean, the question goes not to the copyright offices
2 managing the statements of account. It's to the
3 certification forms for '97 programs.

4 A I thought you asked about the time period
5 between the filing of claims and the --

6 Q No, no. What I was asking for is
7 essentially the delay between the receipt of
8 certification -- I mean, it appears what you did in
9 this proceeding, was file Exhibit 3 based upon 1996
10 programming data.

11 A Correct.

12 Q And then later, days before the hearing
13 began, amended to include 1997 data.

14 A Correct.

15 Q The 1997 data was not collected until
16 October or November of 2000, some seven, eight months
17 after the filing of the direct case.

18 A Right.

19 Q And I was just trying to understand what
20 would have prompted a delay in the preparation of what
21 is obviously relevant, highly relevant material, so
22 that it's made part of the record five or six days

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1 before the filing of the case -- or, before the
2 beginning of testimony?

3 A Then I was answering the question
4 appropriately. We don't run a distribution database
5 in anticipation of litigation. We run a distribution
6 database within our normal course of business
7 activities.

8 As I was explaining, in order to pick the
9 sample stations on which the distribution will be
10 based, we have to have a full year's worth of data so
11 that we pick the best stations.

12 The copyright office -- the cable
13 operators made their payments for 1997, too, in March
14 of '98. The copyright office takes about three months
15 to photocopy the statements of account and put them
16 out into the public area.

17 It takes the employees of CableData, I
18 think, about six more months to enter in manually the
19 data from the statements of account. So the start of
20 our process cannot commence until we have a full
21 year's worth of data from which to pick the sample.

22 So, again, our activity is keyed toward

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1 the availability of data with the purpose of making
2 distribution, not with the objective of presenting
3 information in litigation.

4 Q Isn't it -- I believe we have
5 correspondence that you provided. Actually, both in
6 connection with the filing of -- or, in connection
7 with the supplemental discovery served on January 4th,
8 and early discovery, that indicated the requests --
9 the identification of the stations in the sample were
10 selected in approximately February of 1999. Is that
11 correct?

12 A If that's what it says, I have no --

13 Q And so, TVData, which would have sent the
14 logs on an ongoing basis, so the logs -- the magnetic
15 tapes would have been resident at CDC starting,
16 presumably, in 1997, is that the sequence?

17 A That's right.

18 Q So TVData had the logs in '97. The
19 station list had been identified in February of '99.
20 So that the 82 stations in your survey were identified
21 at that point in time. Wouldn't that be correct?

22 A Wait, say that again.

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1 Q The request to Nielsen for the Nielsen
2 data, and the stations identified, occurred in
3 February of '99.

4 A Okay. And?

5 Q Okay. The 82 stations are thereby
6 identified.

7 A Right.

8 Q Okay. And what I'm trying to understand
9 is for document filed, the original Exhibit 3 was
10 filed in April of 2000.

11 A Okay.

12 Q The Revised Exhibit was submitted in
13 January of 2001. Okay? And I'm just trying to
14 understand why the '97 certifications were relied
15 upon. They were received, you said, in October of
16 2000. The program identifications were available
17 sometime during 1999. Would that be correct?

18 A Right, yes.

19 Q But no effort was made to obtain
20 certifications during any of that extended period?

21 A You make it sound like I was sitting
22 around twiddling my thumbs doing nothing. In reality,

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1 1997 was not my only activity during the period in
2 question. During that period, we distributed cable
3 television royalties, satellite carrier royalties,
4 went through internal reviews of those processes,
5 wrote testimony, and started the preparation of the
6 database.

7 One of the reasons our expenses are so low
8 is because the person who primarily does all of this
9 work is myself. And I do the work as it comes in.
10 And sequentially, if I can -- or chronologically if I
11 can.

12 Q And that was another thing I wanted to get
13 to. Do you have a staff? I mean, is it you alone, or
14 are there --

15 A I have -- we hire out the computer
16 processing to CableData. We get the study from
17 Nielsen. I have one assistant of a secretarial
18 nature.

19 Q Yes. And yourself?

20 A And myself.

21 Q And in terms of what your primary focus
22 and work is on -- and has your work evolved? You've

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1 been at -- you've been, you said, at MPAA since --

2 A Since 1982, February.

3 Q Seventeen, eighteen years. Has the nature
4 of what you've done changed materially during that
5 period?

6 A I would say no.

7 Q So you're initially -- you became
8 involved, and just walk me through, sort of, what you
9 view your primary day to day, sort of, you know, real
10 expertise -- what you do from day to day with respect
11 to this whole process.

12 A There isn't a typical day.

13 Q Well --

14 A If there were, I'd be litigating all the
15 time, okay?

16 Q Then let me be more specific. Earlier
17 this morning, you gave a description -- and part of
18 yesterday -- of cable copyright compulsory license
19 procedures.

20 A Right.

21 Q You personally know that material pretty
22 well, and I think you sort of outlined it. Do you

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1 consider yourself an expert in that area?

2 A Yes.

3 Q And that goes both with respect to the
4 copyright law requirements for claims, both claims and
5 obligations of cable systems to make payments?

6 A I think the filing requirements -- correct
7 me if I'm wrong -- are not within the copyright law,
8 but within the regulations of the old CRT and the
9 CARP.

10 Q Yes.

11 A The filing requirements for cable systems,
12 I believe, are within the law.

13 Q Yes. And so, between the copyright act or
14 the compulsory license for cable, this is how you
15 would characterize, and sort of, in a broad summation,
16 what your primary work involves, would that be true?

17 A I don't go around thinking about signal
18 carriage rules a lot.

19 Q Yes.

20 A Although I spend about 12 -- well, I would
21 say 12 weeks a year I think about signal carriage
22 rules, okay? Two months a year I think about filing

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1 requirements.

2 Q Yes.

3 A Maybe one month a year, or two months a
4 year, I might prepare for litigation.

5 Q Yes.

6 A What else goes on? And then the rest of
7 the time, I devote to distributing monies.

8 Q Distributing monies?

9 A Yes.

10 Q Okay. You made -- would I be correct in
11 assuming that you don't view yourself as an expert on
12 all phases of copyright law.

13 A Definitely not.

14 Q And issues regarding ownership, licensing,
15 and the like are matters that you have some passing
16 familiarity, but you wouldn't consider yourself an
17 expert?

18 A That's true.

19 Q And you earlier made reference to
20 conflicts when they come up with respect to claims in
21 that producers complain and distributors complain, and
22 what you do, as far as your responsibilities, is

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1 basically, put those into a cubby hole that says
2 conflicts, and you let the parties work out the
3 relationships?

4 A That's exactly right.

5 Q Have you ever had any opportunity to
6 review any contract agreements between producers and
7 distributors?

8 A On rare occasions, yes.

9 Q We're talking about a handful of
10 situations in which --

11 A I would say in my entire career -- I'm
12 really grabbing at a number here -- a dozen.

13 Q A dozen in 20 or some odd years.

14 A Right.

15 Q And with the intent to study them, to
16 analyze them, to opine about them, or just -- they
17 were available, and you reviewed them?

18 A Well, I certainly saw excerpts from
19 contracts with respect to our hearings here, mostly
20 because I wanted to know what the source of disputes
21 is between our groups.

22 I'm trying to think outside of that. I

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1 think I saw contracts with respect to some sort of a
2 rate review proceeding a long time ago.

3 Q Have you ever written contracts?

4 A I've never written a contract, at least
5 not, you know --

6 Q So your review of this material and this
7 ten, 12 documents over this period of years is really
8 just that, a review of the material. You haven't been
9 asked to issue any formal opinions about any of the
10 material?

11 A No, I have not been.

12 Q And you wouldn't --

13 A I wouldn't be able to.

14 Q You wouldn't be able to, and you wouldn't
15 presume to?

16 A Right.

17 Q Okay. With regard to generally matters of
18 corporate law, you were -- do you have familiarity
19 with the nuances of various state laws regarding
20 corporations?

21 A I have no information, experience,
22 exposure to that whatsoever.

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1 Q And you wouldn't opine about that, either,
2 would you?

3 A No.

4 Q With regard to the broadcast industry, I
5 recall you said yesterday that you had taken a course
6 at -- I don't know whether it was mentioned earlier
7 when John Mason -- several places, but you had taken
8 a course in communications.

9 And I don't believe you would consider
10 yourself an expert in communications law and policy,
11 and the practice?

12 A No. I'm sorry if you thought that was a
13 legal course. It was not a legal course. That was a
14 course about head-ins and coaxial cable, and God knows
15 what else, but it was about the technical aspect of
16 cable television.

17 Q Was it the equivalent of a college
18 semester, or was it --

19 A Yes, it was a college semester. Had I
20 been an enrolled student, I would have gotten credit
21 for that.

22 Q Okay. And have you taken courses in

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1 advertising?

2 A No advertising.

3 Q No advertising. Do you consider yourself,
4 in terms of your, sort of, knowledge of the
5 advertising industry, have you ever worked for an
6 advertising company?

7 A Never worked for advertising.

8 Q And in terms of your knowledge of the
9 advertising industry, as a general matter, do you feel
10 you are an expert in that?

11 A I know that when I read an article and my
12 eyebrows go up, and I have an emotional reaction to
13 it, I trust my feelings.

14 Q I don't know if you've answered the
15 question.

16 A I am not an expert.

17 Q You're not an expert. And in terms of
18 returning to the broadcast -- well, let me ask this.
19 You described coaxial cables and head-ins, and the
20 like. That's the terminology that would be associated
21 with the cable industry.

22 Have you done similar course of study in

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1 the broadcast television industry?

2 A I have not.

3 Q You have not. And in terms of the
4 broadcast industry itself, do you consider yourself an
5 expert in any aspects of the broadcast industry?

6 A Certainly I'm not a qualified expert in
7 terms of giving testimony. However, I have been, for
8 20 years, been looking at what television stations
9 broadcast. I've been looking at who owns the
10 programs, what time slots they're programmed, and so
11 -- what do you mean by an expert? Maybe I can answer
12 the question.

13 Q Well, I'm trying to discover whether your
14 qualifications satisfy -- at least initially, whether
15 you would hold yourself out as someone whose opinion
16 could be taken as an expert opinion dealing with the
17 broadcast industry, in general, and then I'll get into
18 aspects of the broadcast industry beyond that.

19 A I certainly would say I do not have the
20 experience of someone who works day to day in the
21 broadcast industry. On the other hand, I have spent
22 nearly 20 years looking at what kind of programming --

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1 not just series and movies, but sports, local
2 programming, what have you -- is programmed, and what
3 time slots, over close to 20 years on certainly,
4 thousands of television stations, possibly -- I don't
5 know how many stations I've looked at in 20 years.

6 Q When you say, looked at, are you saying
7 you've looked at data -- you haven't personally
8 watched --

9 A Correct. I haven't sat in front of a TV
10 screen and watched 10,000 television stations, no.

11 Q You've effectively reviewed TVData logs,
12 as you've had access to. And the logs would identify
13 on entries of -- on an hourly, half hourly basis,
14 programs that are carried by the specific stations
15 within the MPAA surveys?

16 A Actually, I was not thinking of it in
17 those terms. The TV, and the history of MPAA, the
18 TVData program logs are not a new arrival. But I
19 would say -- I'm trying to remember. We either
20 started getting them in 1990, or we started getting
21 them in '95. I just don't remember.

22 Q Yes.

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1 A But what I was thinking of was when I
2 first came to MPAA, I worked -- I was sort of, I
3 guess, my boss then, Alan Cooper, sort of, exposed me
4 to whatever was going on.

5 So my recollection is that my first
6 hearing was a Phase I hearing. So I wouldn't have
7 had, for 1979, a phase -- I mean, a TVData program
8 log. I would have been looking at Nielsen's data.

9 So in that particular regard, I would have
10 been looking at -- I'm going to make this up. I'm not
11 saying this is true. But let's say there were 100
12 stations that year --

13 Q I'd rather -- let's not make up stuff.
14 Let's go back. In other words, what I wanted to try
15 to understand, is you consider yourself a person who's
16 knowledgeable, having looked at a subset of data,
17 whether it's from TVData or if it was from other
18 sources, as to programs that are carried on television
19 stations.

20 A I don't know how to answer the question.
21 I certainly am not an expert witness in that regard.
22 On the other hand, I know a lot more than most people

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1 on the street, about programming a television station,
2 and what TV stations have carried for more than 20
3 years. I don't think that -- I'm not ignorant.

4 Q I'm not trying to, sort of, characterize
5 one way or another. I'm simply trying to ask, with
6 respect to your testimony, what we can include, based
7 upon your expertise.

8 And you've worked for 20 years, or
9 probably 17 years at MPAA, focusing in this particular
10 area subset of the cable compulsory license. And as
11 I understand what you've done, a lot of work that
12 you've done, has been associated with reviewing what
13 are effectively, program laws, that identify the
14 carriage of programs on particular stations.

15 A What I tell you is that for 17 or 18
16 years, I have been looking at television stations that
17 were the most heavily carried by Form 3 cable systems,
18 what kind of programs they broadcast, not only in our
19 own category, but across the board. And being
20 immersed in the programming of stations --

21 Q Do you have personal knowledge, or can you
22 opine about why a program is carried on a particular

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1 station, at a particular time period?

2 A I would say it's because the broadcaster
3 hopes to make a nice advertising dollar from the
4 program by attracting the most number of viewers.

5 Q And do you consider that an expert
6 opinion?

7 A Yes.

8 Q So you view yourself as an expert on the
9 reasons -- so, your view -- the reasons broadcast
10 stations carry programs is for advertising --

11 A Or for other revenue that might be
12 available to them.

13 Q Are there other reasons, other than
14 revenue, that would justify, in your mind, the
15 carriage of programming?

16 A There may be. I don't -- I can't name
17 any.

18 Q In terms of the agreements that broadcast
19 stations execute for the carriage of programming, do
20 you have any personal knowledge about those
21 agreements?

22 A I do not.

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1 Q And similarly, do you consider yourself an
2 expert on such agreements?

3 A No.

4 Q Have you ever had opportunity to review
5 any agreements?

6 A I've never seen one.

7 Q Have you served as a witness in any other
8 proceeding other than these CARP proceedings, or CRT
9 proceedings? And I believe you mentioned a Canadian
10 proceeding, which I may get into in a moment.

11 But have you appeared, other than in this
12 context in that -- I believe you said the one instance
13 in Canada -- in any -- as a witness in any other
14 proceeding?

15 A Other than my appearance before the
16 Judiciary Committee, no.

17 Q And you appeared as a witness in the
18 Judiciary Committee?

19 A I spoke about the rates that satellite
20 carriers are paying.

21 Q So --

22 A Or the proposed rate.

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1 Q A proposed rate, which again related to
2 the CARP procedures?

3 A Yes. In that particular regard, we had
4 gone through litigation like this and secured a nice
5 rate for copyright owners. And we were in danger, and
6 ultimately did lose it, because the Congress
7 overturned the rate that we had gotten from the CARP.

8 Q And the substance of your testimony
9 related to what?

10 A It had to do with the rates, and I can
11 remember one line from it, and it was that people paid
12 more for a bowl of bean soup from the kitchen than
13 they paid for the carriage of a broadcast signal for
14 six months.

15 Q And that related to your knowledge of the
16 rates charged under the compulsory satellite scheme.

17 A That the CARP had ruled, and we were
18 trying to keep the rate there instead of having the
19 Congress overturn it.

20 Q With regard to the -- you said earlier
21 that you have access to certain programming data via
22 this modem line, but you don't have access to

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1 household viewing hours.

2 A Not through the modem.

3 Q Not through the modem?

4 A No.

5 Q You have access when you request summary
6 information from Mr. Larson.

7 A Correct.

8 Q Do you have any personal input in the
9 development of the household viewing data?

10 A The household viewing hour calculation for
11 the Nielsen data was developed probably just before I
12 arrived at MPAA. If I was there in February of '82,
13 my guess is that the methodology had been developed
14 within the previous year or so. With respect to the
15 portion of the year for which we interpolated data, I
16 watched the development process take place. I did not
17 take part in it.

18 Q You were not an active participant.

19 A No.

20 Q So am I correct in understanding that you
21 just said that with regard to the development of the
22 household viewing data you had no personal involvement

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1 whatsoever?

2 A No. In the development of the
3 methodology.

4 Q You had no involvement with -- so the
5 answer might be yes. You had no --

6 A I'm sorry. You're correct.

7 Q Okay. With regard to the development of
8 this, you said this was done -- there's the household
9 viewing data, which is -- that are ratings oriented,
10 and then the interpolations. Who was responsible for
11 the household viewing data?

12 A You mean calculating it?

13 Q You said the methodology was basically in
14 place before you started working.

15 A Right.

16 Q Who was responsible for developing that?

17 A I believe it was my boss, Alan Cooper.

18 Q And did I understand you correctly that
19 the methodology has remained substantially unchanged
20 from when he developed it before you started working?

21 A With the exception of the interpolations
22 it is unchanged.

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1 Q We'll get to that in a second. Okay. And
2 the interpolations then was developed by whom?

3 A Certainly my boss, possibly -- I'm just
4 trying to think -- certainly he had to talk with Mr.
5 Larson to talk about the programming of it. To my
6 knowledge, it was my boss who developed the
7 interpolations.

8 Q And did you work closely with Mr. Cooper
9 in the development of that?

10 A I watched the process; I did not
11 participate in it.

12 Q Did you have any input at all in the
13 process?

14 A No.

15 Q Did Mr. Larson have any input in the
16 process?

17 A To my knowledge, no, but I don't know that
18 for a fact. Let me just be clear: He's a data guy;
19 Alan was a program guy and a ratings guy. So in terms
20 of who would have had the expertise to develop the
21 idea it would have been Mr. Cooper.

22 Q And approximately when was the

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1 interpolations --

2 A That's what I can't remember. It was
3 either '90 or '95, I just don't remember.

4 Q '90 or '95. Are you referencing calendar
5 years or proceedings?

6 A Royalty years for the distribution of
7 either 1990 or '95 royalties.

8 Q And there are both cable and satellite
9 proceedings. Are you speaking about cable 1990 -- and
10 1990 was actually a combined year, 1990 to '92?

11 A I'm not talking about proceedings at all.
12 I'm talking about distributions of royalties.

13 Q Again, let me understand. The
14 interpolations were developed for the physical
15 distribution of royalties occurring in calendar year
16 1990 or --

17 A The year '90 or '95, I just don't
18 remember.

19 Q And with -- do you know what royalty years
20 were the subject of those '90 or '95 distributions?

21 A The 1990 royalties were part of litigation
22 covering the years 1990 from '92. The year '95 was

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1 settled.

2 Q And all of this would have been done
3 within the past several years?

4 A I would say within the last five years.

5 Q So sometime after 1995 the interpolation
6 process kicked in? I just want to place it in time.

7 A I got to tell you, I just don't know. I
8 think in terms of royalty years. Right now, for me,
9 reality is -- believe it or not, actually, for me
10 right now the year is somewhere between 1992 and 1998.

11 Q I understand.

12 A And this is calendar year 2000. I just --

13 Q I understand.

14 A If I'm confused, I'm not trying to
15 obfuscate. I don't know --

16 Q I understand.

17 A -- when it took place.

18 Q And you say that because day in and day
19 out you handle the distributions of monies collected
20 on an annual basis but trailing because of the delay
21 in collection and the delay in settlement or
22 litigation in distribution. You primarily figure out

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1 that final formula to get money to people. That's
2 where you spend a substantial bulk of your time.

3 MR. POPHAM: I'm going to object, because
4 I think Mr. Lutzker has characterized a great deal of
5 her testimony, and I'm not sure his characterization
6 is square with what she said.

7 MR. LUTZKER: I'm satisfied with her
8 testimony, so I won't need to recharacterize. Thank
9 you.

10 BY MR. LUTZKER:

11 Q Getting back to the interpolations, it's
12 your recollection, putting aside the year, that Mr.
13 Cooper was the one who devised the calculations.

14 A That's right.

15 Q CDC, Mr. Larson. And when we say CDC, if
16 anyone other than Mr. Larson is a critical entity,
17 just if you can remember to make note of it, because
18 you personified the Company with him.

19 A As I do.

20 Q Yes. So CDC did not have any
21 responsibility other than, I'll describe it as a
22 mechanical role, to implement the directions from Mr.

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1 Cooper.

2 A That's right. They programmed the
3 methodology.

4 Q Did anyone at Nielsen participate in the
5 development of the interpolations?

6 A It's possible. I don't know the answer.
7 I don't recollect that anyone did.

8 Q In terms of the sample stations that are
9 selected, what is the process that MPAA undertakes,
10 and who undertakes that process to select the stations
11 that are used in the sample?

12 A For 1997, I undertook the process. I
13 requested that CableData -- and I know you have it,
14 because I just gave it to you a couple hours earlier
15 -- provide us with a printout that lists the broadcast
16 stations that were carried by Form 3 systems on a
17 distant basis and the number of subscribers to which
18 they were available.

19 I then go through and check off the ones
20 that had -- I just look at the subscriber counts. And
21 I think -- you know, I can't remember for 1997 whether
22 I did 80,000 or 90,000. I think I did 90,000. And if

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1 a station was available to 90,000 distant subscribers
2 or above, I determined that would be part of the
3 distribution sample.

4 Q And in terms of that determination, you
5 personally made that determination?

6 A Yes.

7 Q And on what basis did you choose the
8 number of subscribers?

9 A Well, it's sort of a combination of what
10 I was talking about today. I don't want to buy so
11 much data that I spend all the royalty monies doing
12 data. On the same token, I want to get enough
13 stations in there so that I feel like we've accounted
14 for the exposure of our programs to as many viewers as
15 possible. I don't know if there's any room for
16 instinct in this, but I would say if there is room for
17 instinct, where I drew the line was where I drew the
18 line.

19 Q Have you read any prior CRT opinions
20 regarding the MPAA methodology?

21 A Yes, I have.

22 Q Do you recall any criticism of MPAA

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1 methodology in the past regarding station selection?

2 A I recollect that NAB has been unhappy
3 either because we had too many or not enough network
4 affiliates. I'm sure you're going to be more than
5 happy to provide other instances, but that's the only
6 one that I recall.

7 Q With respect to -- not NAB -- but with
8 respect to any conclusions drawn by the Panel, whether
9 it's the CRT or the CARP evaluating the methodology,
10 do you recall any decisions or comments by the, well,
11 we'll call it the Panel, with regard to the station
12 selection?

13 A I don't know.

14 Q And so it would be reasonable to conclude
15 that you did not have that information in your mind
16 when you made your determination regarding the station
17 selection for 1997.

18 A That would be reasonable.

19 Q With regard to -- let me just try to
20 finish going through the testimony here just so I can
21 get again an -- with regard to Exhibit 4, which was a
22 listing of movies, is this a document that you

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1 personally prepared?

2 A Yes, it is.

3 Q And how did you do that?

4 A I entered -- I had Exhibit 3, and I sorted
5 it according to number of broadcasts and did the top
6 50.

7 Q You say you sorted it according to number
8 of -- is this as a result of your modem access?

9 A No. Wait, let me think about that. How
10 did I get that? It was probably emailed -- the reason
11 I'm confused about this is that our original
12 proceeding covered '93, '94, '95, '96, '97, and we had
13 originally written testimony for a larger case. So I
14 got to tell you I don't recall the format in which the
15 data came to me. I don't think it was a diskette. I
16 think it was probably emailed.

17 Q But you had data from CDC.

18 A Correct.

19 Q In other words, you instructed Mr. Larson,
20 without putting words in your mouth, but the '96
21 certifications that we have, sort the information by
22 owner.

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1 A I didn't refer to the certifications. I
2 would have just said, "Give me all the titles. And to
3 the extent that you know ownership based on '96,
4 credit those programs to the same owners in '97 that
5 they were in '96."

6 Q When you say, "Give me all the titles,"
7 was there any discrimination made in titles or was it
8 related to the what I'll call the Exhibit 1 claimant
9 list?

10 A No. I was looking for all series and
11 movies.

12 Q All series and movies, irrespective of
13 ownership.

14 A Correct.

15 Q The exhibit is titled, "Titles Claimed by
16 MPAA Represented Program Suppliers." So is that --

17 A I'm sorry, I was thinking of the Alpha
18 list. Would you ask the question again?

19 Q Sure. Exhibit 3, which is a listing of --

20 A It's an alphabetical listing, and I went
21 off on a tangent in my mind.

22 Q Okay.

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1 A Okay. Start over again.

2 Q Okay. Just to clarify again, this listing
3 of titles in Exhibit 3, as originally prepared, which
4 it titled, "Titles Claimed by MPAA Represented Program
5 Suppliers," is indeed a full listing of programs
6 claimed by program suppliers that MPAA represents.

7 A As per my understanding in April of 2000.

8 Q So, in other words, there shouldn't be
9 programs claimed by other parties or programs that are
10 not claimed by MPAA parties in this listing.

11 A Well, certainly there are titles that both
12 the IPG group and our group claim, so I would expect
13 to see those titles in there.

14 Q And are there any others that would not
15 fit that category?

16 A Well, I have since deleted quite a few
17 titles, but in the original Exhibit 3 they would have
18 been there.

19 Q And they would have been there why?

20 A Because we had credited them to owners in
21 '96.

22 Q Programs credited to owners in '96 are

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1 included here, owners that you represent.

2 A Correct.

3 Q And so there are no programs in Exhibit 3
4 that are owned by or claimed by parties that you don't
5 represent.

6 A I have a feeling you've got an example of
7 one, but to my knowledge, the --

8 Q I'm just trying to clarify what it is. I
9 just want you to explain.

10 A What I believe Exhibit 3, as originally
11 filed, is, is a listing of programs that were
12 broadcast during 1997 for which an MPAA represented
13 claimant had claimed entitlement in 1996.

14 Q Okay. And the ownership list for 1996 was
15 prepared how?

16 A It wasn't prepared. It existed in the
17 database based on our '96 distribution of royalties.

18 Q And so as I understand your process, you
19 only distribute royalties if you have a signed
20 certification form?

21 A Correct.

22 Q So all titles in the '97 list would have

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1 been claimed in 1996 and certified by represented
2 companies.

3 A That's right.

4 Q And it is not to say that all these
5 programs are indeed properly claimed or credited to
6 those same owners in '97.

7 A Well, we certainly see a list that we
8 dropped a claim for. And we also see another list for
9 which we had asserted a claim. So, clearly, like I
10 said, libraries get sold from one year to the next;
11 ownership changes. It is appropriate to anticipate
12 that some owners will change from year to year.

13 Q Okay. We'll get back to it. I just
14 wanted you to continue going through this process.

15 CHAIRPERSON CAMPBELL: Before we -- could
16 we go off the record for just a moment, please?

17 (Whereupon, the foregoing matter went off
18 the record at 2:34 p.m. and went back on
19 the record at 2:51 p.m.)

20 CHAIRPERSON CAMPBELL: Back on the record.
21 Thank you for allowing that. I think it served
22 everybody's purpose well.

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1 Mr. Lutzker, we're back with you.

2 BY MR. LUTZKER:

3 Q Ms. Kessler, so I was getting back onto
4 Exhibit 4, just the origin of this. You had indicated
5 that there was either an email or some electronic
6 document from CDC to you containing the data in
7 Exhibit 3.

8 A Correct.

9 Q And you used that to prepare this
10 document.

11 A That's right.

12 Q And you primarily decided to choose 50
13 titles at random based upon -- random in terms of your
14 releasing in some sequential order as far as number of
15 broadcasts?

16 A It was not random. It was in order of --
17 descending order of broadcasts.

18 Q And the number 50 has no magic to it, I
19 assume.

20 A Not that I'm aware of. As you know, we
21 have 3,000 movies in our claim. My guess is the vast
22 majority of them had one broadcast, two broadcasts,

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1 something like that.

2 Q Okay. Exhibit 5 also is something you
3 personally prepared?

4 A That's right.

5 Q And, again, how did you do this?

6 A What we did was I picked -- this is where
7 I had some help with people typing. I went through
8 for each of the programs listed here and determined
9 the stations that broadcast the program in 1997. And
10 I wrote down --

11 Q Let me interrupt you there. How did you
12 determine that?

13 A Looked in I believe the ROSP, which is the
14 Report on Syndicated Programming. This is a
15 publication by Nielsen. And reported all of the
16 stations that had broadcast the program, I think,
17 during November of '97. Then --

18 Q Can I interrupt you on that point again?

19 A Yes.

20 Q You said you looked in the ROSP, which is
21 the --

22 A Report on Syndicated Programming.

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1 Q -- Report on Syndicated -- does the ROSP
2 -- these are all series programs; there are no movies
3 in this?

4 A It's series programs.

5 Q Okay. So the ROSP contains series only;
6 is that correct?

7 A It contains series only with some
8 exceptions. Remember when I was talking about --

9 Q Why don't we -- that's therefore by the
10 exceptions of the ROSP.

11 A I know, but the exceptions are important.
12 The exceptions are that Nielsen sees the Fox network,
13 WB, and UPN as networks, and therefore Fox programming
14 on those other two networks, I believe, are not
15 reported in the ROSP. So while we would be consider
16 them to be syndicated for purposes of distribution,
17 they would not have been reported in the ROSP.

18 CHAIRPERSON CAMPBELL: Excuse me. Let me
19 ask a quick question. Who compiles the ROSP? Is that
20 Nielsen?

21 WITNESS: That's Nielsen. In fact,
22 there's a -- Exhibit 6 is a page from the ROSP. I'm

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1 not going to talk -- I'll tell you, I won't talk about
2 everything in here on the page; let me just give you
3 some highlights from it. This is from the November
4 '97 ROSP for the series "Home Improvement." And
5 remember I said things were stripped typically Monday
6 through Friday. You can see that "Home Improvement"
7 has the designation M/F, which is Monday through
8 Friday. It says it's a 30-minute program.

9 MR. LUTZKER: Marsha, if I could just --
10 if the Chair wishes to have a discussion at this
11 point, then I'll defer, but I know that based on the
12 timing --

13 CHAIRPERSON CAMPBELL: I'm fine. I just
14 wanted to know who prepared it. It's Nielsen. But
15 thank you, though; appreciate it.

16 BY MR. LUTZKER:

17 Q In terms of -- what I wanted to do is get
18 into the development of this specific list.

19 A Okay.

20 Q And you're saying that -- just take "Star
21 Trek: Deep Space Nine." You have a reference to 69
22 million and change sets.

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1 A Correct.

2 Q And those -- what I want to know -- I just
3 want to understand how you develop the data.

4 A Okay. That's where I was going with the
5 ROSP.

6 Q Right.

7 A So what I did was I recorded the stations
8 that broadcasted and to the extent that station was
9 carried on a distant basis by a Form 3 cable system,
10 I recorded the number of subscribers, distant
11 subscribers, to which that station was available.

12 Q And how did you know the stations recorded
13 -- the stations that had distant subscribers?

14 A Through CableData.

15 Q And was there a separate CableData file
16 document that you were working off of or were you
17 again just sending a request to Mr. Larson?

18 A There was a computer printout that I was
19 working with.

20 Q Okay. So you have a computer printout of
21 all the stations. In fact, let me -- yes. This,
22 actually, is a document that we had some familiarity

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1 with before, and I'm going to give you both of these,
2 and I'll have this marked.

3 MR. POPHAM: Now, what are we marking? Go
4 off the record for a second.

5 (Whereupon, the foregoing matter went off
6 the record at 2:57 p.m. and went back on
7 the record at 2:59 p.m.)

8 WITNESS: Now, I have two. Why does
9 everybody else have one?

10 MR. LUTZKER: Well, I'll explain.

11 MR. POPHAM: Could you remove that from
12 the microphone?

13 WITNESS: Sorry.

14 BY MR. LUTZKER:

15 Q Ms. Kessler, I've handed you a document
16 which we're calling IPG Exhibit 1-X.

17 (Whereupon, the above-referred
18 to document was marked as IPG
19 Exhibit No. 1-X for
20 identification.)

21 A Which one is 1-X?

22 Q I'll explain that.

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1 MR. POPHAM: Which one are we doing now?

2 MR. LUTZKER: The document that's been
3 distributed is IPG Exhibit 1-X.

4 MR. POPHAM: One document.

5 MR. LUTZKER: One document.

6 BY MR. LUTZKER:

7 Q Ms. Kessler, are you familiar with this
8 document?

9 A Yes, I am.

10 Q Would you describe the document?

11 A There are actually two documents here.
12 The first one -- they are both computer printouts
13 generated by CableData Corporation, both dated
14 February 1, 1999. The first document is a one-page
15 document, and it's entitled, "TV Stations Which Exceed
16 80,000 Distant Subscribers when Form 1-2 systems
17 Included." It has multiple columns of data with
18 respect to the television station, the call sign, type
19 of station, affiliation, channel, community of
20 license.

21 Then it is followed by five columns of
22 data. The first one says 97-AVG, FW1, which I believe

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1 means Form 1 Dist Subs. The second column, 97-AVG,
2 FT, or Form 2, Dist Subs. The next column, Sum F1
3 plus F2 Dist Subs. The next column, 97-AVG, F3, or
4 Form 3, Dist Subs. And a column which appears to
5 summarize what I believe are distant subscribers per
6 CableData, Sum F1 plus 2 plus 3 Dist Subs.

7 Q And then the what you characterize as a
8 second document, which is a continuation?

9 A No. It's a completely different document.
10 It's not numbered. My copy has seven pages, and this
11 appears to be a summary of the carriage of broadcast
12 stations by Form 3 cable systems from the period '93-1
13 through the period '97-1. It's alpha by call sign.

14 CHAIRPERSON CAMPBELL: Could we take a
15 hold just briefly. Because these are two different
16 documents that we have just been identifying, shall we
17 then mark the top one, the one-page document, IPG 1-X?

18 MR. LUTZKER: That's fine.

19 CHAIRPERSON CAMPBELL: And the seven-page
20 one IPG 2-X. Thank you.

21 (Whereupon, the above-referred
22 to document was marked as IPG

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1 Exhibit No. 2-X for
2 identification.)

3 BY MR. LUTZKER:

4 Q And, Ms. Kessler, regarding IPG 2-X, is
5 this the same document that I gave you yesterday
6 indicating that on page 2 calls signs were not -- the
7 page was cropped in the back so it didn't provide all
8 the call signs, and it appeared to be separately
9 missing a page?

10 A Yes, it is.

11 Q And did you provide me a document which
12 I'll characterize as --

13 A Two documents stapled together?

14 Q -- two documents stapled together. Well,
15 in other words, did you provide me an additional
16 document, which I will mark as --

17 A 1-XA and 2-XA.

18 Q -- IPG 3-X?

19 (Whereupon, the above-referred
20 to document was marked as IPG
21 Exhibit No. 3-X for
22 identification.)

1 CHAIRPERSON CAMPBELL: Are those two
2 documents also.

3 BY MR. LUTZKER:

4 Q And can you identify IPG 3-X?

5 A I believe it is identical 2-X with the
6 exception that the page that was previously cropped is
7 now represented in full, and the page that was missing
8 is now present.

9 Q Okay. And for the record, we will --
10 since we are just getting this today, we will produce
11 completed copies of this for tomorrow.

12 A Actually, we may have enough copies. Joe,
13 do we have -- who do you need them for?

14 Q Well, just to submit it for the record so
15 it's the correct document.

16 A Okay. Because I have more than what I
17 gave you.

18 Q We can deal with that later.

19 A I saved some. They're in my briefcase.
20 Don't give away my source document.

21 Q Let's hold up on that.

22 CHAIRPERSON CAMPBELL: So where are we,

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1 please?

2 BY MR. LUTZKER:

3 Q Okay. Turning to Exhibit 5 and the
4 summation of distant subscribers, this document was
5 provided in discovery. Are you familiar with that?

6 A Yes.

7 Q IPG 2-X was provided in discovery --

8 A Oh, okay.

9 Q -- to IPG.

10 A Correct.

11 Q And when you speak of a listing of call
12 signs and subscribers and the like, is this a document
13 that you would have referred to?

14 A I believe it is; I'm not sure.

15 Q Okay. And when you sum the, just using
16 the "Star Trek" example, the 69 million subscribers,
17 you would have taken the call letters for all the
18 stations?

19 A That were carried as distant -- I'm sorry,
20 all the stations reported.

21 Q All the stations. Did you -- how did you
22 deal with two reporting periods in a calendar year?

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1 If it was carried on KABC --

2 A Right.

3 Q -- look at --

4 A I just did the second half of -- oh, I see
5 what you're asking. I just did the second half of the
6 year.

7 Q You just used '97-2 data in the
8 preparation of this. And in fact in the selection of
9 the stations that you made in this proceeding, the 82
10 stations, you only used '92 data; is that correct?

11 A '92 data?

12 Q I'm sorry, '97-2 data.

13 A I don't think so. I think probably what
14 I would have done would have been to enter them on the
15 computer average and then --

16 Q The selection of the 82 stations was made
17 based upon '97-1 distant subscribers and '97-2 distant
18 subscribers summed and then divided by 2.

19 A Correct.

20 Q And then if it had 80,000 subscribers --

21 A Or more.

22 Q -- or more or 90,000, you don't recall

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1 which --

2 A Right.

3 Q -- you would have then selected that
4 station.

5 A Right.

6 Q You did not consider, even though you had
7 access to, as IPG Exhibit 1-X indicates, you did not
8 consider Form 1 and 2 subscribers?

9 A No.

10 Q And was there a decision for not including
11 them in that selection process?

12 A To my knowledge -- let me restate that.
13 I don't know what qualifications anyone at CableData
14 would have for making determinations with respect to
15 distant and local. And I don't know what their basis
16 would have been for preparing this. Therefore,
17 because I don't know what they know regarding the
18 signal carriage rules, I was not willing to accept
19 this as data for making a selection.

20 Q So data from CableData that you have now
21 personally reviewed -- let me try to understand.
22 MPAA's worked with CableData, you said, since when?

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1 A Probably the royalty year 1979.

2 Q And we're now in the royalty year 1997?

3 A Correct.

4 Q And the treatment of local and distant is
5 as a definition used by CableData is something that
6 MPAA is not comfortable with?

7 A CableData's task is to record the
8 information on statements of account, not to analyze
9 it. I don't know what their procedures are for
10 determining distant versus local, and there was no
11 reason for me to do that.

12 Q And MPAA never issued any instructions to
13 CableData?

14 A I personally have never.

15 Q And Mr. Cooper?

16 A It's not likely that he would have. I
17 won't say categorically that he didn't, but it's not
18 likely that he would have.

19 CHAIRPERSON CAMPBELL: Let me ask a
20 question. CDC is to record statements of account and
21 provide you with that material.

22 WITNESS: Correct.

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1 CHAIRPERSON CAMPBELL: What they've
2 located. What does that mean, recording statements of
3 account? What statements of account?

4 WITNESS: I can actually take you to the
5 next room if you'd like to go on a little walk.
6 There's a guy over there right now. He has a laptop
7 computer in front of him. By the way, the Copyright
8 Office does not allow CableData to plug their
9 computers into the wall, so CableData has to work on
10 laptops that run on batteries. What the young man
11 does is he looks at the statement of account --

12 CHAIRPERSON CAMPBELL: Can you describe --
13 he's looking at a statement of account. Is that the
14 Copyright Office statement of account, and if so, for
15 the record, what is it?

16 WITNESS: The statement of account is a
17 document filed by the cable operator, and it
18 accompanies the royalty payment every two years.

19 CHAIRPERSON CAMPBELL: Are those
20 statements in a form that is provided -- format
21 provided by the Copyright Office or is it just they've
22 asked for specific information, and you can provide it

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1 in your own format? Do you know?

2 WITNESS: They provide the form. The
3 cable operator fills out the form, signs it, and
4 returns it with the payment.

5 CHAIRPERSON CAMPBELL: Thank you. And
6 then back to what the CDC people do.

7 WITNESS: They record the accounting
8 period. I believe there is a control number of some
9 kind associated with each cable system. The owner of
10 the cable system, as reported -- all of this is as
11 reported -- communities served -- I'm mentally going
12 through the booklet -- subscribers and royalty fee
13 information, broadcast stations carried, and then all
14 of the data in these first few columns -- the kind of
15 station, the channel, the city to which it's licensed.
16 If it's a Form 3, a designation as to whether it's
17 distant or local. Turn the page, turn some more
18 pages. Revenues, number of channels that carry
19 broadcast stations. Turn the page. Then the various
20 schedules by which cable operators calculate their
21 royalty fees. Then a summation of the royalty fees
22 reported.

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1 CHAIRPERSON CAMPBELL: And when Mr.
2 Lutzker asked you about, what was it, the exceeding --
3 what was the question he asked you right before this?
4 And your response was, "I don't know, because they do
5 it, and they just report it in." Do you know what I'm
6 saying?

7 WITNESS: Let me ask if this was the
8 question.

9 MR. LUTZKER: The question was that she
10 relied upon Form 3 cable systems. IPG Exhibit 1-X is
11 a listing of distant signals -- subscribers --

12 CHAIRPERSON CAMPBELL: Right, distant
13 subscribers.

14 MR. LUTZKER: -- as carried on Forms 1 and
15 2 plus 3. And apparently the Form 1 and 2 data is
16 ignored.

17 WITNESS: That's right.

18 CHAIRPERSON CAMPBELL: Because?

19 WITNESS: The reason is because when cable
20 operators in Form 1 and Form 2 systems make their
21 royalty fee payments, they do not have to declare
22 their distant stations. The Form 1s pay a flat \$28

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1 every six months. The Form 2s have a formula that is
2 a percentage, but it does not take into account the
3 number or the type of distant stations carried. It is
4 -- I'm not going to even speak to that. I don't know
5 what it is, but let's just say it's a half a percent
6 of their royalty fees. So they just multiply whatever
7 that percentage is times their revenues, and that's
8 their royalty payment.

9 CHAIRPERSON CAMPBELL: And there's no way
10 for you to discern that number or that accounting,
11 because they're not required to provide anything.

12 WITNESS: I personally could for -- I
13 don't know how many cable systems. But in terms of
14 people who are keying in data that is not their task
15 to do signal carriage analysis. It is just -- it is
16 almost word processing, not quite. It's probably a
17 little more sophisticated than word processing.

18 BY MR. LUTZKER:

19 Q Ms. Kessler, isn't true, though, that Mr.
20 Larson performs an additional function not based upon
21 information within the CableData report, cable
22 filings, but based upon geographic locations between

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1 the smaller cable systems and the carriage of signals
2 to make the judgment that signals are distant for
3 purposes of a particular community?

4 A If he has represented that to you, I will
5 accept that he's represented that to you. I've not
6 used those data, and I've not examined them. I don't
7 know anything about them. I cannot speak
8 authoritatively on that.

9 Q But if one were trying to perform a
10 function of capturing information that had an impact
11 on smaller markets, one could make certain reasoned
12 judgments based upon the location of a television
13 signal to a cable community and conclude quite
14 appropriately that this signal is distant under rules
15 that would otherwise apply to the cable system in that
16 locality.

17 MR. POPHAM: I'm going to object, because
18 I think there's no definition of smaller markets that
19 she might relate to.

20 MR. LUTZKER: It would be Form 1 and 2
21 cable systems.

22 WITNESS: No.

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1 MR. POPHAM: I thought you wanted a
2 smaller market. I want to be clear there.

3 WITNESS: That's what I'm thinking too.

4 MR. LUTZKER: No. I'm referring to the
5 smaller cable systems.

6 BY MR. LUTZKER:

7 Q In other words, if a cable -- if a
8 community has two cable systems, a cable system that
9 is a Form 3 cable system and a Form 1 cable system --
10 in other words, as you testified yesterday, the
11 distinction is principally on subscribers and money.
12 The larger systems have more subscribers, they pass a
13 certain financial threshold, and that kicks them up
14 from a Form 1 to a Form 2 and ultimately to a Form 3.
15 The Form 3s pay in the most amount of money.

16 A Right.

17 Q And if you are a Form 3 system, you have
18 a gross receipts above a certain amount on an
19 annualized basis.

20 A Right.

21 Q If you're a Form 2 or 1, you have receipts
22 below that amount on an annualized basis. If a signal

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1 is a distant signal in a community for a Form 3 system
2 and that same community has a Form 1 or Form 2 cable
3 system, would it not be correct that all the signals
4 that are distant in the Form 3 system are also going
5 to be distant in the Form 1 and 2?

6 A I would have to look at the individual
7 statement of account before I could answer that
8 comfortably. Also, I don't know if that's what Mr.
9 Larson does. I don't know what he does.

10 Q And you've never inquired of Mr. Larson --

11 A No.

12 Q -- in the 17 years that you've been
13 involved. And to your knowledge, neither you nor any
14 other principal at MPAA has inquired of Mr. Larson in
15 terms of the treatment of distant signals for Form 1
16 and Form 2 purposes.

17 A No.

18 Q Is it correct that without knowing
19 anything else, I could take columns, the last two
20 columns on IPG 2-X and on a station by station basis
21 add 97-1 and 97-2, divide by 2 and all signals above
22 your threshold of 90,000 would be in the survey?

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1 A Eighty or 90,000. I just don't remember
2 which one I picked.

3 Q Could you for the record at some point to
4 clarify which it is?

5 A Sure.

6 Q Thank you. But I'm correct, that in other
7 words, all I would have to do is go down this list and
8 for purposes of clarification when we submit 3-X,
9 pages 2 will be clarified as far as the call signs on
10 the left side of the page and there was one page that
11 was missing between pages 3 and 4? In other words, the
12 call signs that go from WBBM to WFUM, there's a
13 missing page and that's what you provided us today.

14 A Okay.

15 Q If I could turn to Exhibit 7, then just to
16 understand the process of preparation of exhibit,
17 again, is this an exhibit that you personally
18 produced?

19 A That one I had someone who was better at
20 Access than I.

21 Q Who was that?

22 A An individual named John Whiting.

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1 Q And it that an employee of MPAA?

2 A No.

3 Q Where does he work?

4 A He is just someone I know who knows how to
5 do data.

6 Q Someone --

7 A An acquaintance of mine.

8 Q An acquaintance. He's not associated with
9 CDC or with Nielsen or with MPAA?

10 A No.

11 Q And when you say someone who is associated
12 with Access, did the data that is used to generate
13 this exhibit, what form was that in? Was that a file
14 that you had received from an --

15 A It was one I believe we entered manually.

16 Q You entered manually?

17 A Right.

18 Q At MPAA?

19 A Right.

20 Q So you did not obtain this information in
21 this exhibit from Mr. Larson?

22 A Well, we got -- the printout came from him

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1 and then we keyed the data in.

2 Q And in terms of -- when you say the
3 printout came -- in other words, you received a hard
4 copy of this information?

5 A Right.

6 Q From -- and you had requested this
7 specifically?

8 A This came so that I could make my
9 distribution selection.

10 Q You're saying "this", I'm sorry, what is
11 this?

12 A This printout.

13 CHAIRMAN CAMPBELL: Could you identify
14 that?

15 THE WITNESS: I'm sorry, what is now
16 called IPG 3-X.

17 CHAIRMAN CAMPBELL: Thank you. If we have
18 copies of the 3-X, I think it would make it much
19 simpler for everyone, especially, the Court Reporter
20 to be able to have it.

21 (Pause.)

22 BY MR. LUTZKER:

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1 Q So IPG 3-X is what you would use as the
2 data base for the subscriber information?

3 A Right, for the second half of 1997.

4 Q For the second half of 1997. And then
5 there's a separate document that you have for the
6 generation of fees?

7 A Right, uh-huh.

8 Q And both of those are provided in printout
9 form and then you have them personally entered into an
10 Access data base?

11 A Actually, I think I entered them into
12 Excel and then we put them into Access and sorted them
13 in Access.

14 Q Okay. In terms of the articles listed in
15 Exhibit 8, these are articles that you personally
16 selected?

17 A I think I asked them to find articles for
18 me and then picked out the ones we wanted for --

19 Q Who did you ask to do that?

20 A I asked someone at Morrison & Hecker
21 picked them out for me. I don't know who it was at
22 Morrison & Hecker.

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1 Q And Exhibit 9, is that something you
2 personally --

3 A I think I did all of these.

4 Q Now also in connection with the discovery
5 requests that were made in this proceeding, where
6 documents were provided and responses provided, did
7 you prepare or participate in all the document
8 discovery responses in connection with your testimony?

9 A As far as I know, I participated in all of
10 them.

11 Q And was it your understanding that if you
12 had access to electronic files that those files should
13 be provided in this proceeding?

14 A Yes.

15 Q And was it your understanding that if you
16 had access to hard copy materials should they be
17 provided?

18 A Yes.

19 Q If they were used in connection with your
20 exhibits?

21 A Yes.

22 Q Let me turn back now to the process in

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1 which you worked with Nielsen in this proceeding. Can
2 you describe what it is you personally do with respect
3 to the generation of what we'll call Nielsen data?

4 A I select the sample stations. I provide
5 Nielsen with a county by county analysis of which
6 stations are local so that they can exclude viewing
7 from those stations, from the cable systems in those
8 counties and just count the distant viewing.

9 Q And again, in the selection of the
10 stations, you are also the keeper of also the finances
11 for this project for MPAA, is that correct?

12 A That's right.

13 Q And at some point you said well, you
14 didn't want to spend all the royalties on generation
15 of data?

16 A That's right.

17 Q What does MPAA pay Nielsen in its expenses
18 as part of this preparation of the data that it
19 receives from Nielsen?

20 A We have a lot of work done for us by
21 Nielsen unrelated to this procedure or this
22 proceeding.

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1 Q For the 82 station quarter hour
2 information?

3 A I don't remember, but my -- I am guessing
4 that it is in the neighborhood of \$400,000.

5 Q And for \$400,000, what services does
6 Nielsen provide to MPAA?

7 A The special study as I have described.

8 Q The special study which consists of
9 quarter hour viewing information on 82 stations?

10 A Well, we have noncommercial stations in
11 there as well, so I think --

12 Q 102 stations?

13 A 102 stations, right.

14 Q And does Nielsen just get the information
15 from you and then -- does it send to you any data or
16 does it go directly to Larson?

17 A Directly to Larson.

18 Q So you don't see it at all?

19 A No. It's nothing that I could use.

20 Q And for that, they charge you \$400,000?

21 A That's right.

22 Q And is this consistent with past

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1 proceedings with respect to Nielsen?

2 A As far as I know, yes.

3 Q So that if -- just as an example, you
4 wanted to take 164 station sample, I don't know how to
5 price this out, but would you expect it to be
6 \$800,000?

7 A For twice data? I don't know.

8 Q You don't know. Does Nielsen produce a
9 document for MPAA entitled "Nielsen Special Study"?

10 A You mean a piece of paper?

11 Q Whether it's in paper or electronic
12 format?

13 A It's my understanding the data comes to us
14 on a CD ROM, it's gold.

15 Q Is that consistent with all procedures in
16 past?

17 A I don't know the answer. My guess is that
18 there was a time when the data came on mag tape.

19 Q Has Nielsen ever provided MPAA a document
20 related to special study?

21 A I'm thinking probably in early years they
22 may have.

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1 Q Define early years?

2 A 1979, 1980, 1981.

3 Q In more recent years, in the year 1989
4 proceeding, in the CRT, would Nielsen have provided a
5 document for its services in connection with the --

6 A I'd have to go back and look. I don't
7 know the answer to that.

8 Q Were you involved in that proceeding?

9 A I think I was. I think I was a witness in
10 this proceeding.

11 Q You were a witness in that proceeding?

12 A Uh-huh.

13 Q Could you go back and check and confirm?

14 A Certainly. Now what you're looking for,
15 a document?

16 Q Looking to determine whether a document
17 was provided by Nielsen to MPAA in connection with its
18 analysis of stations in 1989.

19 A Let me tell you what I'll do, because this
20 is 100 percent of what I have access to. I have a
21 wall of drawers. I will look in there. If I find a
22 piece of paper, then I've got evidence that I had a

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1 document. If I don't find a piece of paper, that
2 doesn't mean I didn't have a document. It just means
3 we haven't kept the files. We haven't saved it for
4 any purpose.

5 Q Well, Mr. Lindstrom would have been
6 involved in that proceeding?

7 A Right.

8 Q The suggestion has been made that it would
9 be useful for IPG to review Mr. Lindstrom's testimony
10 in prior proceedings and in terms of your
11 understanding, there is no difference or is there a
12 difference? This is basically what I want to know.

13 A Okay.

14 Q Is there a difference in the quality and
15 nature of the services Nielsen provided in prior
16 proceedings to this current proceeding?

17 A I would say there's no difference.

18 Q No difference whatsoever?

19 A No.

20 Q And if it turned out that Nielsen did, in
21 fact, provide a document which provided disclaimers,
22 which provided further representations with respect to

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1 the 1989 proceeding, would that surprise you?

2 A Nothing in this life surprises me, Mr.
3 Lutzker.

4 Q Would you have had any occasion to review
5 that information if it had been provided?

6 A It's more likely that for 1989, Alan
7 Cooper would have been the witness working with
8 Nielsen data. I think possibly he would have looked
9 at such a document. I'm not sure that I would have.

10 Q You did not ask Nielsen in connection with
11 this proceeding to provide anything other than the
12 generated quarter hour information on the 82 stations?

13 A On the 102 stations.

14 Q On the 102 stations, the 82 were
15 commercial and 20 were noncommercial.

16 A That's correct.

17 Q Have you had any conversations with Mr.
18 Lindstrom or anyone else at Nielsen regarding the
19 research conducted both the manner and nature of the
20 research conducted in this proceeding?

21 A I have not.

22 Q Do you have any personal knowledge of the

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1 nature of the Nielsen data, that is utilized in this
2 proceeding?

3 A I will tell you my general understanding
4 of diary collection.

5 Q No, I'm asking for your personal knowledge
6 of the data used in this proceeding.

7 A I believe that the data collected in this
8 proceeding were collected in the same way Nielsen has
9 been collecting diary data in the past and I do have
10 general knowledge of that process.

11 Q I appreciate that as does many others in
12 this room. My question is do you have personal
13 knowledge of the data collection practices of Nielsen
14 with respect to the 1997 data that is used in this
15 proceeding?

16 A I do not.

17 Q Okay, in connection with the Nielsen data,
18 you've spoken about interpolations.

19 A Correct.

20 Q Did you make any requests with respect to
21 Nielsen with regard to data that is used by Larson or
22 CDC in connection with interpolation?

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1 A They don't have the data. I wouldn't have
2 made a request for something they don't have.

3 Q Help me then with this process.

4 A Okay.

5 Q You described with the squiggles on the
6 months --

7 A Right.

8 Q The month of June is a nonsweep month?

9 A Right.

10 Q Tell us what happens in the process, as
11 you understand it, for developing household viewing
12 information for the month of June?

13 A Okay. I am not an expert in interpolation
14 so bear with me. This is the Marsha Kessler
15 understanding.

16 Q If I may, let me sort of ask before you
17 get into that, you have mentioned that you
18 communicated to member clients representing companies,
19 the methodology --

20 A Correct.

21 Q The methodology is described in the
22 document?

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1 A Yes.

2 Q And did you write that document?

3 A Yes, I did, actually.

4 Q So the description of the methodology,
5 including interpolations is based on a document you
6 prepared?

7 A It is the document I prepared.

8 Q It is the document. All right, please
9 proceed.

10 A Okay. I think, first of all, the word is
11 interpolation as opposed to extrapolation because we
12 work between periods. So in the example you gave with
13 June, we're working through the periods May and July;
14 May being a period for which Nielsen provided viewing
15 and July being a period for which Nielsen provided
16 viewing.

17 Therefore, we need to estimate some kind
18 of viewing that took place in the month in between.
19 There are three methods of interpolation. There are
20 three calculations that are averaged and we call the
21 word interpolation.

22 The first one is something called straight

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1 line interpolation. The second is forward in time
2 interpolation. And the third is backward in time
3 interpolation.

4 I'm just trying to remember what straight
5 line interpolation is.

6 CHAIRMAN CAMPBELL: Perhaps if you explain
7 to us the forward and backward.

8 THE WITNESS: It's even more difficult
9 than the straight line was th easy one. I was hoping
10 if I got started on that one that I could do the
11 forward and backward in time.

12 Let me go to the forward and backward in
13 time because even though it's more complicated I think
14 I may have a better grasp of that.

15 CHAIRMAN CAMPBELL: Before you do that,
16 who does those calculations?

17 THE WITNESS: Mr. Larson at CableData.

18 CHAIRMAN CAMPBELL: Okay.

19 THE WITNESS: The best I can recollect, I
20 don't want to write on the board, let's just say the
21 viewing for a particular program and a particular time
22 slot was 100,000 viewing hours.

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1 There's a publication that Nielsen has
2 that provides rating information for independent
3 stations, network stations and I believe satellite
4 delivered stations that shows the -- some sort of a
5 rating for different day parts.

6 And there's a different publication for
7 each month.

8 Okay, for the forward in time calculation,
9 I believe we would take that 100,000 household viewing
10 hours from June -- from May -- divide it by that
11 weighting or that viewing share for the month of June
12 and then multiply it times that rating share for the
13 month of July and record that answer.

14 Then for the moving backward in time, in
15 the example, we would take the viewing in that time
16 slot from July, divide it by the rating for that kind
17 of station, that time slot, July, and multiply it
18 times the rating for June and that would be a second.
19 That would give us a second number.

20 I can't remember how to do the straight
21 line one. But, however it's done, the three of them
22 are added together and averaged.

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1 BY MR. LUTZKER:

2 Q You speak of ratings as part of that.
3 What ratings information are you utilizing?

4 A There is -- I don't know what it is. It's
5 a publication that reports viewing in day parts for
6 different kinds of stations for each month of the
7 year.

8 Q So it's not specific stations, it's --

9 A Network stations.

10 Q Network stations, all network stations,
11 all independent stations, all satellite delivered
12 stations, is that the ratings information?

13 A I'll tell you, I don't do it, so I'm on
14 thin ice when I describe the process.

15 But I believe that is what is there.

16 Q Do you know whether the ratings
17 information is metered or diaried?

18 A I don't know the answer.

19 CHAIRMAN CAMPBELL: Excuse me, is that in
20 between month rating information provided on a monthly
21 basis by this source?

22 THE WITNESS: Yes, it is.

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1 CHAIRMAN CAMPBELL: So you get it for all
2 the months, even sweeps months, even though you get it
3 from Nielsen too?

4 THE WITNESS: Correct. It's part of a
5 subscription.

6 BY MR. LUTZKER:

7 Q If it is a nonsweep month, let's say
8 August, September -- a nonsweep month and you're using
9 ratings information, it would by definition it could
10 not be sweep information, is that correct?

11 A That's correct.

12 Q Therefore, is it your understanding that
13 when you interpolate and weight ratings in this
14 manner, you are using both the Nielsen diary
15 information and the Nielsen meter information?

16 A I don't know where the interpolated
17 ratings come from. I would assume they're metered,
18 but I don't know.

19 Q It is true, is it not, that the
20 interpolated weightings are a critical underpinning of
21 the viewing hours associated with each and every
22 program in the MPAA study?

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1 A That's right.

2 Q And it is true, is it not, that if the
3 interpolations provide less than complete information
4 with respect to a particular program, that it could
5 impact significantly or less so, depending upon the
6 data on a particular program share?

7 A Actually, I would say the opposite is
8 true. The reason we went from just using the sweep
9 data to adding the interpolations and I think you're
10 familiar with this, Mr. Lutzker, actually, is that we
11 have been criticized in previous proceedings for only
12 having data related to six months of the year. How
13 could only six months of the year adequate measure an
14 entire year's worth of distant signal viewing.

15 Also, we wanted to make the distribution
16 to our represented companies so that 100 percent of
17 the programming was compensated so that they got
18 credit for all of their programs. Not just those that
19 were broadcast in the sweep periods.

20 Therefore, I would say that the individual
21 shares are enhanced by the additional data, not -- I
22 don't know the opposite word of enhanced is, but

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1 unenhanced. Or undercounted, maybe, I would say.

2 Q Is it your understanding that interpolated
3 data measures actual viewing?

4 A No. It's a good faith effort at
5 estimating something for which we have no data.

6 Q And when you say that it is not measuring
7 actual viewing although I believe that you
8 characterize the viewing hour totals as actual viewing
9 totals, is that correct?

10 A Yes, we do.

11 Q So on the one hand you're saying the
12 viewing hours, if the program has a thousand viewing
13 hours in your study, you're saying the actual viewing
14 of cable households is 1,000 hours?

15 A Yes.

16 Q If --

17 A Well, it depends on where the viewing came
18 from. If it was one show on in November, then it was
19 actual viewing.

20 Q Well, let's say it was one show on in
21 August.

22 A Okay.

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1 Q Is that actual viewing?

2 A That's interpolated viewing.

3 Q So it is not actual viewing?

4 A Correct.

5 Q So your viewing totals are, in fact, not
6 actual viewing, but a summation of interpolated
7 viewing projections and other data that you would
8 characterize as actual viewing?

9 A That's right. But looking at the example
10 that you just gave, someone who only had a show on in
11 August, would not have gotten an allocation at all.

12 Now, there is a basis for making an
13 allocation to that company in a program that it would
14 have been uncompensated before, at least has some hope
15 of some sort of remuneration for the retransmission of
16 it.

17 A lot of people have TV shows in December,
18 Christmas shows that are very popular.

19 Q So this process has allowed you to make
20 allocations to programming during periods when Nielsen
21 sweeps do not exist?

22 A Exactly. That's exactly the objective.

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1 Q And also when you spoke of six months a
2 year, you really need to qualify that, don't you?

3 A That's right.

4 Q How would you qualify that?

5 A For the months of January and October,
6 they have diary data for some markets in the United
7 States, not all.

8 I don't know what the ratio is between
9 those for which they do have and they don't have.

10 Q Do you know the ratio or relationship to
11 the stations that you have selected in your sample for
12 a 4-week, 6-week analysis?

13 A I do not know.

14 Q So you could not tell us now. Could
15 Nielsen tell us?

16 A Actually, I could go back to the office
17 and figure it out. I just don't know here on the
18 stand.

19 Q How could you do that?

20 A I would look at the data for which we
21 received -- well, actually, you can do it because you
22 have the disk from Nielsen that has all the stations

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1 on it and all the periods for which data reported. So
2 that's something actually you can probably do faster
3 than I can.

4 Q So the Nielsen data would provide
5 information regarding the six sweeps and the four
6 sweeps, but you do not make any analysis with judgment
7 with regard to the station selection based upon the
8 availability of Nielsen data?

9 A None whatsoever. See, the objective is to
10 pay as many people as possible for as many titles as
11 possible. It's not to cut somebody off. The opposite
12 is the objective. It's to bring people in, bring
13 titles in, bring where there is no viewing, some
14 objective standard for making a payment.

15 Q Correct me. I thought you'd indicated
16 earlier that you don't receive Nielsen data?

17 A Correct.

18 Q And now you're suggesting you can go back
19 to your office and --

20 A I can call Tom.

21 Q That's what you're referring to that you
22 could make a separate call?

1 A Right.

2 Q With respect to a station that is in the
3 four sweeps and not the six sweeps, but in your study,
4 what is done with respect to the viewing in January
5 and October for that station?

6 A I don't know. I would have to ask Tom.
7 My guess is that an effort at interpolating is there,
8 but I don't know that for a fact.

9 Q And you don't know on what basis the
10 effort, you've never inquired of that?

11 A I've never inquired, but it is easy for me
12 to imagine that the same process would -- he would go
13 back to December of 1996, look at the viewing, go
14 forward to February and plug in the intervening data.

15 Q With respect to Nielsen reports, have you
16 had any occasion to review any written reports from
17 this in the course of your 17 years at MPAA?

18 A Yes.

19 Q And do you have any of those in mind in
20 terms of what those reports look like?

21 A Well, when I did the county analysis, I
22 rely on a publication that lists each designated

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1 market and it's counties.

2 I look at the ROSPs. Do you have
3 something in mind? I don't mind prompting.

4 Q Let me ask you with respect to the ROSPs
5 and, in fact, that's the document that was referenced
6 in our earlier discussion and a page of it exists as
7 Exhibit 6. This is one page. The ROSPs are very
8 substantial, thick documents.

9 A It's two-volume books that come out four
10 times a year.

11 Q And you've had occasion to work with ROSPs
12 during the course of your career?

13 A Yes, I have.

14 Q And is there any information provided by
15 Nielsen with respect to the way the data in the ROSPs
16 should be evaluated?

17 A I don't know.

18 Q You don't know.

19 A Actually, I have this ROSP at my desk.
20 I'll be happy to bring it in and photocopy the
21 introduction for you, if that would be helpful.

22 Q But in the course of your work, you've not

1 had any occasion to sort of review any of that
2 material that you recall?

3 A No.

4 Q Would it surprise you that Nielsen, in
5 fact, does provide with respect to its documents
6 disclaimers regarding the nature of its research?

7 A No, I wouldn't be surprised.

8 Q And would you be surprised to learn that
9 based upon the data that is selected, Nielsen provides
10 varying degrees of what we'll call relative error or
11 statistical deviation factors?

12 A Will you tell me the question again?

13 Q Would you be surprised that Nielsen
14 provides information regarding the relative errors
15 that may be ascribed to its data?

16 A No, I wouldn't be surprised.

17 Q You wouldn't be surprised. Are you
18 familiar with any such documents that have been
19 available to MPAA during the course of any of these
20 CARP or CRT proceedings?

21 A We put in a different study in our
22 1990-1992 case and I believe we had standard errors

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1 done for that.

2 Q You can standard errors. Were those done
3 in connection with the data specifically addressed in
4 the 1990-1992 proceeding?

5 A Yes.

6 Q And did you in the course of your dealings
7 with Nielsen solicit any information with respect to
8 this proceeding?

9 A No.

10 Q Regarding standard deviations or errors?

11 A No. And the reason is that we did not put
12 the study in. We selected data from the Nielsen study
13 for our distribution purposes and those are the data
14 that we have entered into this proceeding.

15 Q Now let me understand this. There is
16 selected data and there is a study?

17 A Correct.

18 Q You used the selected data for purposes of
19 this proceeding?

20 A Correct.

21 Q There is a study?

22 A Yes. You have it.

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1 Q And we have what you define as the Nielsen
2 study.

3 A We gave you the CD that Nielsen physically
4 gave us is now in your possession.

5 Q And that's your definition of the Nielsen
6 study?

7 A Yes.

8 Q If that -- I'll call it a document. It's
9 a CD-ROM which we had been provided.

10 A Uh-huh.

11 Q And you recall the difficulty we had
12 opening the document and there were several versions
13 that sort of passed back and forth --

14 A Let me just comment on that. And that is
15 that I took the CD home and opened it with no
16 difficulty in the computer I have in my basement.

17 Q But that CD consists of what you define as
18 the Nielsen study?

19 A Correct.

20 Q And you opened that document yourself?

21 A Yes.

22 Q And did you review the document?

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1 A No.

2 Q You don't know whether it contains any
3 qualifications or further --

4 A I did not look at every line of data, but
5 I just saw data.

6 CHAIRMAN CAMPBELL: May I ask just a
7 clarification and that's the same -- the CD you're
8 talking about that passed from your hands to Mr.
9 Lutzker through this, it's a special study from
10 Nielsen, the one that you discussed about a half an
11 hour ago that cost roughly \$400,000 and that
12 information goes from Nielsen to CDC for CDC to
13 prepare in a format that was eventually produced?

14 THE WITNESS: Correct.

15 CHAIRMAN CAMPBELL: Thank you.

16 MR. LUTZKER: If we could take about a
17 five minute break so I can --

18 CHAIRMAN CAMPBELL: Yes. Can I ask one
19 question, just a clarification matter. It's a good
20 time to do it.

21 Earlier, Ms. Kessler, you had talked about
22 -- it's right before you were talking about the report

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1 on syndicated programming, you said that you would
2 contact CDC and based on our sample they would give
3 you additional information.

4 THE WITNESS: Correct.

5 CHAIRMAN CAMPBELL: And when you said
6 based on our sample, what is that sample?

7 THE WITNESS: Like I said, it would be
8 burdensome and costly to look at viewing data for
9 every distant signal in the United States, so I go
10 through the process of selecting the stations that
11 will be in the sample, using as my criterion the
12 number of distant subscribers during the particular
13 year.

14 For 1997, and I can't remember whether I
15 had a cut off of 80,000 or 90,000, but whatever it
16 was, stations that were available to a minimum of
17 80,000 or 90,000 distant subscribers would have been
18 included in the sample.

19 For 1997, there were 102 stations of which
20 20 were noncommercial stations and 82 were commercial
21 stations.

22 CHAIRMAN CAMPBELL: So that's the sample

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1 you're talking about?

2 THE WITNESS: Yes ma'am.

3 CHAIRMAN CAMPBELL: Okay, great. I just
4 wanted to get that clear.

5 Thank you. And this is a good time for a
6 break. I know you need it. And I'm sure Mr. Lutzker
7 could use one too.

8 Thank you. How about 10 minutes, 15
9 minutes?

10 MR. LUTZKER: That's fine.

11 CHAIRMAN CAMPBELL: We'll take 10 or 15
12 minutes.

13 (Off the record.)

14 CHAIRMAN CAMPBELL: Have a seat. I hope
15 you settled.

16 MR. LUTZKER: We have discussions going on
17 and what we can suggest was for purposes of this
18 afternoon since it's the original time anyway to break
19 that we break now and Ms. Kessler will be available
20 tomorrow and her testimony will be completed tomorrow
21 and in the meantime the parties will --

22 CHAIRMAN CAMPBELL: Have a chance to talk?

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1 MR. LUTZKER: Have a chance to talk.

2 CHAIRMAN CAMPBELL: That's an excellent
3 idea.

4 MR. POPHAM: And we'll begin with Mr.
5 Galaz on Thursday morning.

6 CHAIRMAN CAMPBELL: And that will give us
7 a chance to read some more testimony from past.

8 So excellent. I'm glad you're talking.

9 THE WITNESS: I've got to say I'm
10 disappointed. I'm ready to go.

11 CHAIRMAN CAMPBELL: That adrenaline is
12 pumping.

13 THE WITNESS: That's right.

14 CHAIRMAN CAMPBELL: Well, this is
15 excellent, I think, particularly in proceedings like
16 this to have the parties feel they're in a place where
17 they need to chat. It's very, very good, I think. No
18 matter where that leads the proceedings, it will
19 definitely allow for a more viable discussion and
20 hearing in the future.

21 So it's almost 4:35. Are there any other
22 preliminary matters?

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1 Let's go off the record for a few moments.

2 (Off the record.)

3 MR. POPHAM: Mr. Lutzker and I have
4 reviewed reproductions of drawings on the easel by Ms.
5 Kessler during the course of her voir dire and direct
6 and cross as well and these drawings have now been
7 reproduced as MPAA Exhibit 18, 19, 20, 21, 22 and 23.

8 And I believe that there being no
9 objection to their admission, we would move their
10 admission.

11 MR. LUTZKER: And I'll state on the record
12 that we agree.

13 (The documents referred to was
14 marked for identification as
15 MPAA Exhibit No. 18, 19, 20,
16 21, 22 and 23 and were received
17 in evidence.)

18 CHAIRMAN CAMPBELL: Excellent.

19 MR. LUTZKER: For those submissions.

20 CHAIRMAN CAMPBELL: Do you want to
21 identify each one just so that it makes it easier?

22 THE WITNESS: Do you want me to help you

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1 out with that?

2 MR. LUTZKER: Would you, please?

3 CHAIRMAN CAMPBELL: That would be the most
4 appropriate way.

5 Why don't you state it and if Ms. Kessler
6 agrees with that, she can make that clear for the
7 record.

8 ARBITRATOR DAVIS: Number 18 is a chart
9 that was referred to yesterday. It consists of the
10 Phase 1 Claimants. Is that correct?

11 THE WITNESS: I would describe it
12 differently. I would describe it as the entire
13 Nielsen study from which we can get data related to
14 each of these categories for purposes of analyzing the
15 relative shares.

16 MR. POPHAM: Perhaps Nielsen study
17 categories?

18 THE WITNESS: I would just say Nielsen
19 study.

20 CHAIRMAN CAMPBELL: That might make some
21 third party think that that's the study right there.

22 THE WITNESS: We paid for it.

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1 (Laughter.)

2 CHAIRMAN CAMPBELL: Perhaps the Nielsen
3 study categories.

4 THE WITNESS: Okay.

5 ARBITRATOR DAVIS: Number 19 I have down
6 as a chart of distant signal coverage.

7 THE WITNESS: Or analysis.

8 ARBITRATOR DAVIS: Number 20 I have is
9 Grade B contour.

10 THE WITNESS: Correct. And that is also
11 for a distant local analysis.

12 ARBITRATOR DAVIS: 21 is another chart
13 with DSE calculations.

14 THE WITNESS: Correct.

15 ARBITRATOR DAVIS: And 18, 19, 20 and 21
16 were referred to yesterday in your testimony.

17 Number 22 is another chart. Could you
18 describe that, please?

19 THE WITNESS: I don't know.

20 MR. POPHAM: This is 22.

21 THE WITNESS: He was referring to 18.

22 ARBITRATOR DAVIS: No, please describe 22.

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1 THE WITNESS: I'm sorry. 22, okay. 22
2 shows how Exhibit 18 is -- the exhibit is not reduced.
3 It shows that we take the data with respect to series
4 of movies from the Nielsen study for purposes of
5 calculating the royalties.

6 MR. POPHAM: Distribution categories?

7 THE WITNESS: Distribution categories.

8 ARBITRATOR DAVIS: And number 23, if you
9 could briefly tell us the legend on the chart for
10 number 23?

11 THE WITNESS: Source of viewing data for
12 the distribution data base. January, some of the
13 stations are surveyed by Nielsen, some are not. Same
14 is true for October.

15 With respect to February, May, July and
16 November, those are sweep periods which means the data
17 come from the Nielsen study.

18 The months of March, April, June, August,
19 September and December, the data are interpolated.

20 ARBITRATOR DAVIS: I have no further
21 questions. Is this sufficient identification?

22 MR. LUTZKER: Fine with me.

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1 CHAIRMAN CAMPBELL: If there is no further
2 business, we will reconvene tomorrow morning, promptly
3 at 9:30. Is that satisfactory?

4 MR. LUTZKER: Yes, it is.

5 CHAIRMAN CAMPBELL: Thank you very much.
6 Thanks for your time today.

7 (Whereupon, at 4:47 p.m., the hearing was
8 recessed to reconvene tomorrow, Wednesday, January 10,
9 2001 at 9:30 a.m.)

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 Distribution of 1993, 1994, 1995,
 1996 and 1997 Cable Royalty Funds,
 Docket No. 2000-2 CARP CD 93-97

Before: Library of Congress
 Copyright Arbitration Royalty Panel

Date: January 9, 2001

Place: Washington, DC

represents the full and complete proceedings of the
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